

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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IN THE MATTER OF:
1784 CAPITAL HOLDINGS, LLC

Applicant

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For the Application

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Mary Means

Community Opposition Witnesses:¹

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Conor Crimmins, Council Member

Darin Bartram, Council Member

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Attorney for the Town of Kensington

Deborah Chalfie

Julia O'Malley

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

¹ Although OZAH received many letters for and against this application, under Rules 3.1. and 3.2 of OZAH's Rules of Procedure for Zoning and Conditional Use Cases, only the Applicant and those who testify at the OZAH hearing, or who are granted party status by the Hearing Examiner, are considered "parties of record" and listed in this caption. Those who wrote letters but did not testify at the OZAH hearing are defined as "Participants."

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I. STATEMENT OF THE CASE

On September 21, 2018, 1784 Capital Holdings, LLC, filed an application, pursuant to Zoning Ordinance §59.3.6.8.D.2.b., for a Conditional Use to allow construction and use of a 141,433 square-foot building, 75 feet in height, devoted mostly to a self-storage facility. The facility would be located at 10619 Connecticut Avenue, on the Southeast corner of the intersection of Connecticut Avenue (MD 185) and Plyers Mill Road, in Kensington, Maryland.

The Applicant's final plans would allocate approximately 90 percent of the building to a self-storage facility and about 10 percent to artists' studios and a ground-floor restaurant. The site, which is identified as Part of Lot 2, Lauraner Knowles Estate, consists of a 1.06-acre property owned by Mountain View Burleson, LLC under Tax ID No. 13-0102136 (Exhibit 6). The Applicant is the contract purchaser, and the owner has authorized the application (Exhibit 4). The site is in the CRT-2.5, C-2.0, R-2.0, H-75 Commercial Residential Town Zone, and it is subject to the 2012 Kensington Sector Plan.

The case was originally scheduled for a hearing on January 11, 2019, but at the request of the Applicant (Exhibits 36 and 37), the hearing date was moved to February 8, 2019 (Exhibit 39). By email exchange (Exhibit 39), the Applicant requested a further continuance of the hearing date.

On May 21, 2019, the Applicant filed extensive amendments to its plans (Exhibits 40 and 40(a-i)). At the request of the Applicant (Exhibits 41, 42 and 43), the OZAH hearing was scheduled for August 2, 2019, and a notice of hearing and of the motion to amend the application was issued on June 18, 2019 (Exhibit 44). No objections to the proposed amendments were filed.

On June 19, 2019, the Mayor and Town Council of the Town of Kensington adopted Resolution R-12-2019, formally opposing this conditional use application. Exhibit 59, Attachment 4. At the request of the Planning Department and the Applicant, the OZAH hearing was thereafter rescheduled to August 9, 2019 (Exhibits 45 to 49), and a Notice of Rescheduled Hearing was issued

on June 28, 2019 (Exhibit 50). On July 10, 2019, Tracy Furman, Mayor of the Town of Kensington, wrote to the Planning Board, attaching Resolution R-12-2019, and stating the Town's reasons for opposing the conditional use application. Exhibit 59, Attachment 4.

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on July 15, 2019, recommending denial of the application, based mostly on inconsistency with the 2012 Kensington Sector Plan and some issues about the safety of the proposed site access and planned site circulation. Exhibit 59. As stated by Staff (Exhibit 59, p. 3):

Staff recommends denial of the application. The proposed self-storage facility is inconsistent with the Kensington Sector Plan's ("Sector Plan" or "Plan") vision for a vibrant and pedestrian-friendly Town Center. A self-storage facility, which is inherently a low activity, car-centric use, would create the antithesis of the vibrant, walkable area envisioned by the Sector Plan. In addition, the proposed use will create a non-inherent adverse impact to the development potential of the abutting and confronting properties considering the overall vision of the Sector Plan.

The Montgomery County Planning Board met on July 25, 2019, and after hearing from Technical Staff, the Applicant and the community, voted 3-2 to also recommend denial of the application, as indicated in the Chair's letter of July 31, 2019. Exhibit 64(a).

The application is supported by a number of community members (Exhibits 60(a)-(s))) and opposed by others (Exhibits (Exhibits 70(a)-(III))), including, as noted above, the Town of Kensington (Exhibit 33, Attachment 4 to Exhibit 59, Exhibit 66 and Exhibit 123).

On August 7, 2019, two days before the scheduled August 9 hearing, the attorney for the Town of Kensington filed a motion (Exhibit 74) to continue the hearing because her law firm had a conflict of interest. The next day, the Applicant filed its opposition to the continuance request (Exhibit 76). Because the motion was filed so close to the hearing date, there was no time to issue notice of a continuance, so the public hearing proceeded as scheduled on August 9, 2019. However, the parties were given an opportunity to argue the motion at the hearing to decide whether to proceed fully then or to postpone the bulk of the hearing to a future date.

At the August 9, 2019 hearing, the Hearing Examiner addressed some preliminary matters, took testimony from four community members who wished to be heard, and after oral argument, granted the motion of the Town of Kensington to postpone the bulk of the hearing to another day so that Michelle Rosenfeld, Esq., who entered her appearance for the Town of Kensington, could familiarize herself with the case. Tr. 8/9/19, 32-33. Attorney Suellen Ferguson agreed that her law firm, “Council Baradel,” would pay reasonable costs (about \$7,000) for transportation and appearance of the Applicant’s experts. Tr. 8/9/19, 34. All counsel agreed to resume the hearing on August 20, 2019, which was announced on the public record. Tr. 8/9/19, 33-34.

The hearing resumed, as scheduled, on August 20, 2019, and arguments were heard on a number of legal issues raised by the Hearing Examiner. The Applicant then called six witnesses in support of its application, and introduced various exhibits, including new signage plans (Exhibits 87(a)-(m)), and a breakdown of the Applicant’s legal expenses of \$8,782 for the truncated hearing on August 9, 2019 (Exhibit 88). At the end of the day, counsel for both parties agreed to resume the hearing on September 3, 2019, and the resumption date was announced on the public record. Tr. 8/20/19, 311-313.

On August 28, 2019, the Applicant filed a second revised justification statement (Exhibit 99(e)), and moved to further amend Site, Landscaping and Truck Circulation plans (Exhibits 100 and 101), by reducing the number of parking spaces, shortening some spaces and proposing additional landscaping, as well as a waiver of some parking lot landscaping requirements. The Town of Kensington objected to the motion to amend as untimely, and the Hearing Examiner indicated that argument would be heard on the issue at the September 3 hearing. Exhibits 103-106. Technical Staff (Exhibit 95) and both parties (Exhibits 97 and 99(f)) filed proposals for conditions to be imposed if the application were granted.

On September 3, 2019, the hearing resumed, as scheduled, and the Town of Kensington

withdrew its objection to the filing of an amended application. Instead, all parties agreed to allow the opposition to further cross-examine the Applicant's witnesses and to provide written responses regarding the revised application. The Mayor of the Town of Kensington and two Kensington Council members testified against the application, and the opposition further cross-examined some of the Applicant's witnesses. Others were recalled by the Applicant in rebuttal. Both counsel agreed to keep the record open until September 16, 2019, for the filing of additional Technical Staff comments by September 10, 2019, regarding the August 28, 2019 amendments, and the filing of the parties' written closing arguments by September 16. Tr. 9/3/19, 218-221.

On September 10, 2019, Technical Staff timely filed its response to the exhibits that had been filed on or after August 27, 2019. Staff continued "to recommend denial of this application." Exhibit 120. The parties timely filed their closing arguments (Exhibits 121 and 123) on September 16, 2019, and the record closed, as scheduled, on that date.

For the reasons set forth at length in this Report and Decision, the Hearing Examiner denies the conditional use application. The main basis for the denial is the Hearing Examiner's finding, as discussed in Part II.E. of this Report and Decision, that the proposed use would not substantially conform with the recommendations of the 2012 Kensington Sector Plan, a prerequisite to approval of a conditional use under Zoning Ordinance §59.7.3.1.E.1.c.

II. DETAILS OF THE PROPOSAL, COMMUNITY REACTION & LEGAL ISSUES

A. The Subject Property

As noted above, the conditional use site consists of a 1.06-acre property located at 10619 Connecticut Avenue, on the Southeast corner of the intersection of Connecticut Avenue (MD 185) and Plyers Mill Road, in Kensington, Maryland. It is identified as Part of Lot 2, Lauranter Knowles Estate, and is in the CRT-2.5, C-2.0, R-2.0, H-75 Commercial Residential Town Zone. Technical Staff notes that the site is "currently improved with a vacant gas and service station and surface

parking area.” Exhibit 59, p. 3. Staff supplied both an aerial photo of the property and a photo of the gas station building currently on the site, both of which are reproduced below:



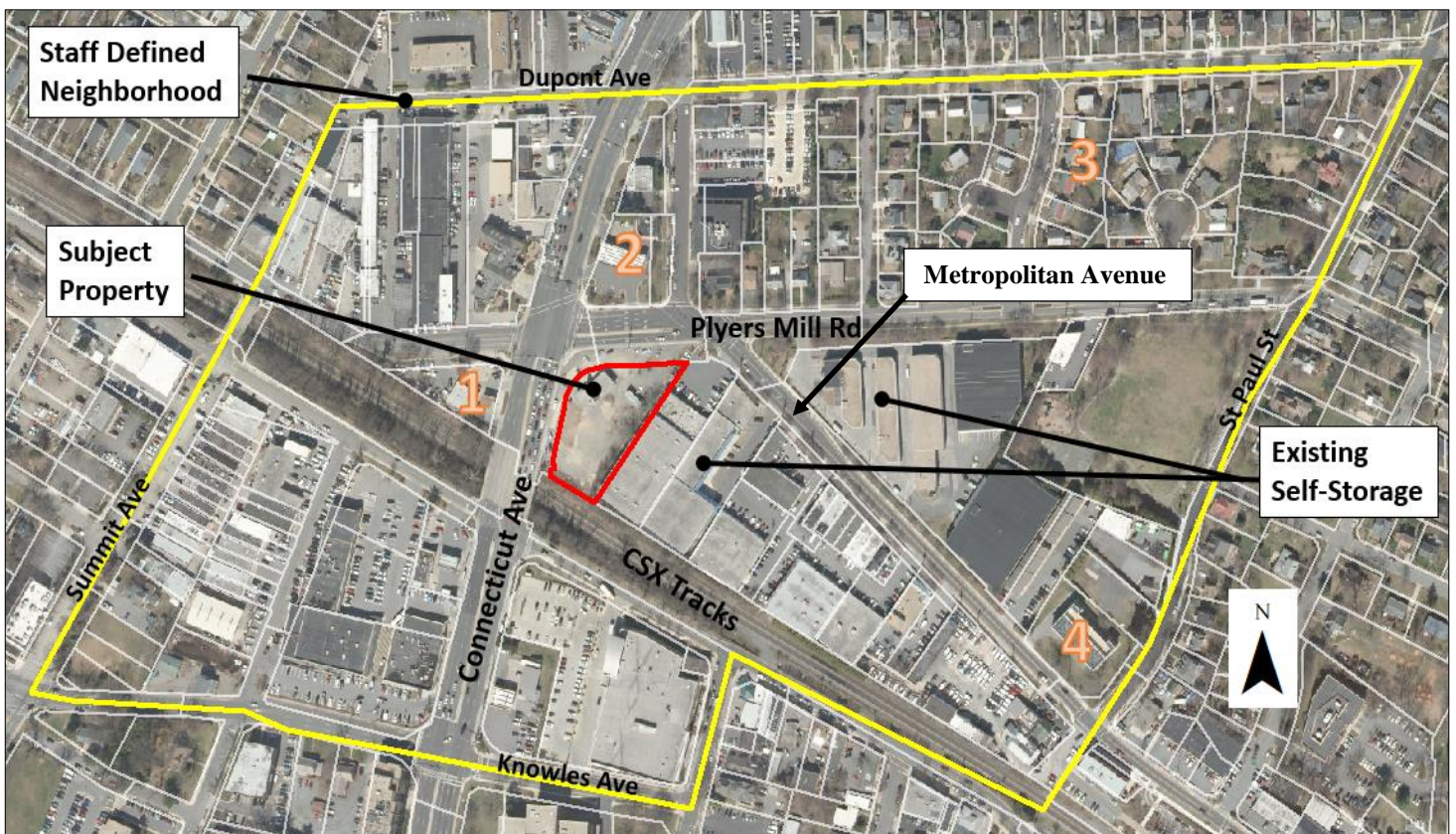
Subject Site in Existing Condition



Existing Gas Station Building on the Subject Site

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the neighborhood with the following Neighborhood Boundaries (Exhibit 59, p. 4): “Dupont Avenue to the north, St. Paul Street to the east, Knowles Avenue/CSX tracks to the south, and Summit Avenue to the west,” as depicted in the following Map provided by Staff (Exhibit 59, p. 5):



The Applicant and the opposition agreed with Staff’s designation of the surrounding area. Tr. 8/20/19, 50. The Hearing Examiner also accepts Staff’s recommended definition of the surrounding area, as it fairly includes the properties that would be most directly impacted by the proposed use. Technical Staff described the surrounding area as follows (Exhibit 59, p. 4):

The Neighborhood is primarily industrial/commercial in character, with two existing self-storage facilities in close proximity to the Property.

Immediately to the east of the Property is a strip commercial building containing a 7-11 convenience store and Baskin Robbins ice cream shop. To the south of the Property are the CSX rail tracks and, over the tracks, a Safeway grocery store and associated surface parking. To the west of the Property, across Connecticut Avenue, are the Kensington Gas Station and the Kensington Volunteer Fire Department. To the north of the Property, across Plyers Mill Road is a Mobil gas station.

Staff identified four approved conditional uses/special exceptions in the defined neighborhood.

Each existing conditional use/special exception is numbered in Staff's Neighborhood map, shown on the previous page, and they are listed below (Exhibit 59, p. 4):

- 1: CBA2827 approved in 1970 for a gas station
- 2: S657 approved in 1978 for a gas station
- 3: S553 approved in 1977 for a home occupation
- 4: CBA2871 approved in 1970 for an electric substation.

C. Proposed Use

1. The Applicant's Vision for the Site and Summary of Proposed Use

The Applicant summarized its proposal for developing the property in its Second Revised Statement in Support of the Application (Exhibit 99(e), pp. 2-3):

1784's Application proposes to construct up to approximately 77,185 square feet of self-storage uses,* approximately 6,337 square feet of ground floor restaurant space, and approximately 8,141 square feet of second floor artist studio space on the Property. The maximum height of the proposed building is 75 feet and the Application proposes 58 parking spaces² and two loading spaces in connection with the proposed use (collectively, the "Project").

*The Application also proposes an additional approximately 49,770 square feet of self-storage below grade in two cellar levels, which area is excluded from the building's gross floor area per the Zoning Ordinance.

*

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The Conditional Use Site Plan included with the Application (the "Site Plan") provides a detailed overview of the Project. As indicated on the Site Plan, the Project includes one mixed-use building, with up to approximately 77,185 square feet of self-

² According to the testimony of the Applicant's architect, Michelle Bach, the final plans call for a total of 56 parking spaces, including 51 standard spaces, 2 loading spaces and 3 handicapped accessible spaces. Tr. 9/3/19, 167. The Hearing Examiner has noted that correction to the Applicant's Second Revised Statement (Exhibit 99(e)).

storage,³ approximately 6,337 square feet of ground floor restaurant space, and approximately 8,141 square feet of second floor artist studio space, with a maximum height of 75 feet. This building will incorporate energy efficient and environmentally friendly design elements such that the Applicant anticipates achieving LEED certification.

The Project also features significant public open space at the corner of Connecticut Avenue and Plyers Mill Road. As shown on the Landscape Plan included with the Application, this area will be approximately 4,977 square feet in area and will feature signature plantings, including a small grove of birch trees, movable seating, low seat walls, and attractive pavers.

The Project proposes direct access to the Property through an existing driveway and curb cut on Connecticut Avenue that will function as a right in, right out access point, and a shared access through the adjacent commercial property to an existing curb cut on Metropolitan Avenue providing full movements for vehicles. The traffic generated by the Project will be limited and result in fewer than 50 peak hour person trips, as illustrated by the Traffic Statement included in the Application.

The Applicant's vision for the proposed building is depicted in four architectural renderings showing the finished building as it will look from four perspectives (Exhibit 40(c)):



³ When the 49,770 square feet of self-storage intended for below grade is added in, the total amount of self-storage planned for this building would be 126,955 square feet, or 89.76% of the total space to be used in the building. The restaurant and artists' studios, together, would occupy about 10.24% of the building.



2 PERSPECTIVE BUILDING VIEW LOOKING NORTH



1 PERSPECTIVE PLAZA VIEW LOOKING NORTH



3 PERSPECTIVE PLAZA VIEW LOOKING SOUTH



Technical Staff provided its own description of the proposed use (Exhibit 59, pp. 5-6):

The Applicant intends to demolish the existing building on the Property and construct an approximately 141,433 square foot, 75-foot-tall building (Figure 4 and Attachment 1). The majority of the building, and the subject of this conditional use application, is a proposed self-storage facility that would occupy 126,955 square feet of the new building. The Applicant proposes a 6,337 square foot restaurant on the first floor of the building and 8,141 square feet of artisan manufacturing and production space on the second floor of the building. The restaurant and artisan manufacturing uses are not the subject of this conditional use application.

The proposed building includes brick facade and metal wall panels. A second story terrace faces Connecticut Avenue, and the rear portion of the building cantilevers over the rear parking area.⁴ The Project includes approximately 4,977 square feet of public open space at the corner of Connecticut Avenue and Plyers Mill Road. The open space area will contain plantings, including a small grove of birch trees, movable seating, low seat walls, and pavers. Shrubs are proposed along the Property's south and east lot lines. A dumpster enclosure and backup generator are proposed at the southern corner of the Property.

* * *

The Project's proposed primary vehicle access is from Connecticut Avenue (MD-185) on the southern portion of the Property via a right-in, right-out driveway. Additional vehicle access is proposed on the eastern side of the site via a new drive aisle leading from the adjacent commercial parking lot located to the east of the Property. The adjacent property owner has provided a letter indicating an agreement to provide an access easement on that property at the time of Preliminary Plan . . . Fifty-seven parking spaces⁵ and two (2) loading spaces are proposed.

2. Proposed Structure, Site Plan, Access, Parking, Circulation and Elevations

Relevant portions of the final Conditional Use Site Plan for the proposed development (Exhibits 101(b), and 40(a)(i) and (ii)) are reproduced below and on the following pages:

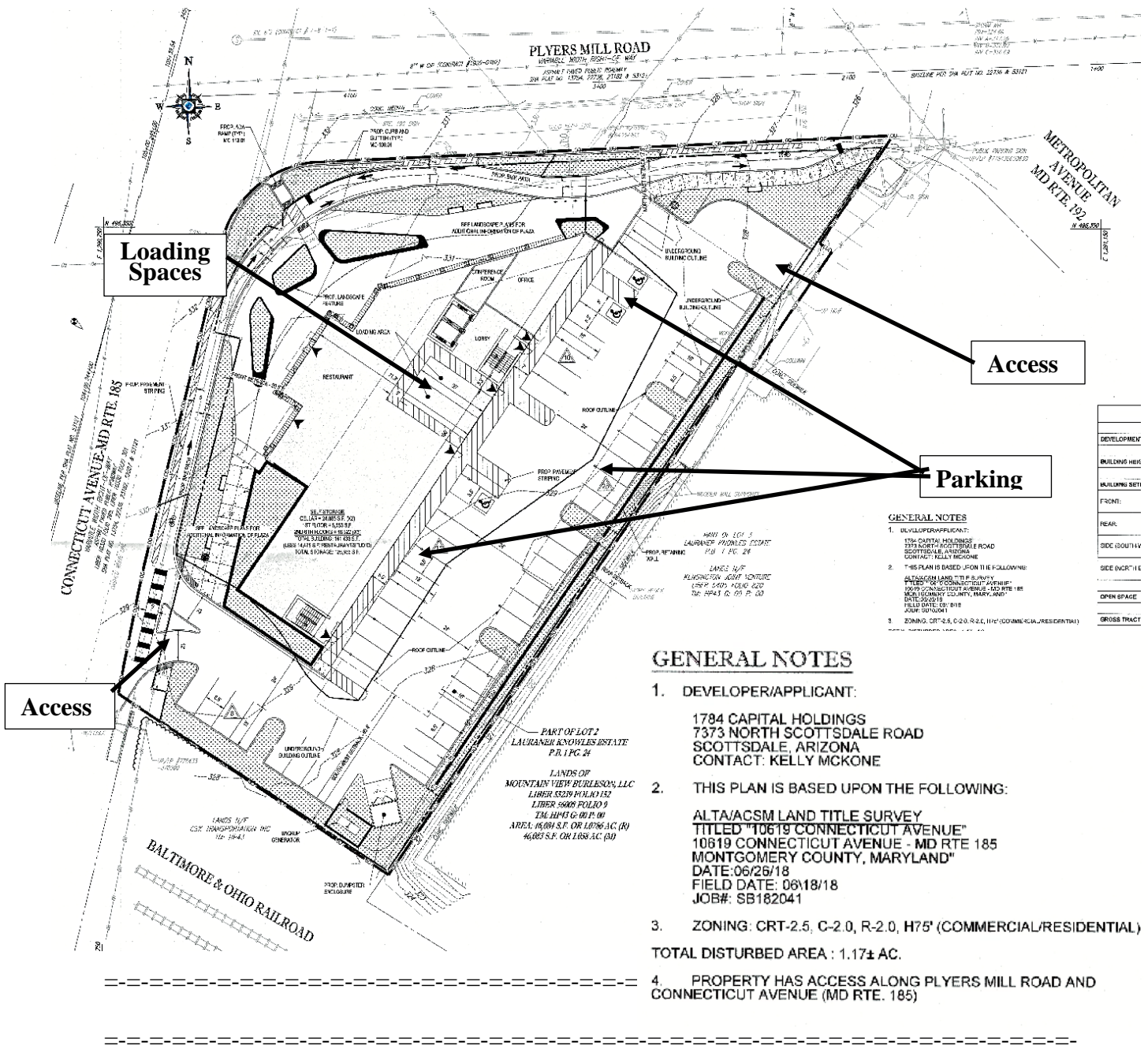
SURVEY NOTES:

1. THE SUBJECT PROPERTY IS PART OF LOT 2, LAURANER KNOWLES ESTATE AS RECORDED IN PLAT BOOK 1 AT PLAT 24 AND BEING THE LANDS OF MOUNTAIN VIEW BURLSON, LLC. AS RECORDED IN LIBER 55239 FOLIO 152 AND CORRECTED IN LIBER 56008 FOLIO 9, AMONG THE LANDS RECORDS OF MONTGOMERY COUNTY, MARYLAND SHOWN ON TAX MAP HP43, LOT P2 PER THE DEPARTMENT OF ASSESSMENTS.

2.	AREA	SQUARE FEET	OR	ACRES
	RECORD	46,084		1.0786
	MEASURED	46,083		1.058

⁴ As explained at the hearing by Applicant's architect (Tr. 8/20/19, 188-189), the building is not actually cantilevered over the rear parking area, but rather overhangs it, since the overhang is supported by three rows of columns.

⁵ As previously noted, the final plans would have a total of 56 spaces, including 2 loading spaces and 3 ADA spaces.



PARKING REQUIREMENTS (ZONE CRT 2.5 C-2.0 R-2.0 H-75)						
USE CATEGORY	ZONING ORDINANCE DEVELOPMENT STANDARDS		PARKING REQUIRED		PARKING PROPOSED	
	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM	STANDARD SPACES	ADA SPACES
SELF STORAGE / RETAIL	STORAGE (77,185 SF) @ 1 SPACE/10,000 SF PLUS 1 SPACE/EMPLOYEE (2 EMPLOYEES)	STORAGE (77,185 SF) @ 3 SPACES/10,000 SF PLUS 1 SPACE/EMPLOYEE (2 EMPLOYEES)	43 SPACES	126 SPACES	53 (2 LOADING SPACES)	3
	ARTISAN MANUFACTURING AND PRODUCTION (8,141 SF) @ 1/1000 SF	ARTISAN MANUFACTURING AND PRODUCTION (8,141 SF) @ 3/1000 SF				
	RESTAURANT (6,337 SF) @ 4/1000 SF	RESTAURANT (6,337 SF) @ 12/1000 SF				

STANDARD DRAWING LEGEND		
FOR ENTIRE PLAN SET (NOT TO SCALE)		
EXISTING NOTE	TYPICAL NOTE TEXT	PROPOSED NOTE
---	ONSITE PROPERTY LINE / R.O.W. LINE	---
---	NEIGHBORING PROPERTY LINE / INTERIOR PARCEL LINE	---
---	EASEMENT LINE	---
---	SETBACK LINE	---
CURB AND GUTTER		
=====	CONCRETE CURB & GUTTER	=====
=====	UTILITY POLE WITH LIGHT	=====
=====	POLE LIGHT	=====
=====	TRAFFIC LIGHT	=====
=====	UTILITY POLE	=====
=====	TYPICAL LIGHT	=====
=====	ACORN LIGHT	=====
=====	TYPICAL SIGN	=====
=====	PARKING COUNTS	=====
-----170-----	CONTOUR LINE	-----190-----
-----169-----	SPOT ELEVATIONS	-----187-----
TC 516.4 OR 516.4		TC 516.04 BC 515.55
SAN	SANITARY LABEL	SAN
W	STORM LABEL	W
SL	SANITARY SEWER LATERAL	SL
W	UNDERGROUND WATER LINE	W
E	UNDERGROUND ELECTRIC LINE	E
G	UNDERGROUND GAS LINE	G
OH	OVERHEAD WIRE	OH
T	UNDERGROUND TELEPHONE LINE	T
C	UNDERGROUND CABLE LINE	C
=====	STORM SEWER	=====
=====	SANITARY SEWER MAIN	=====
U	HYDRANT	U
(S)	SANITARY MANHOLE	(S)
(D)	STORM MANHOLE	(D)
WM	WATER METER	WM
WV	WATER VALVE	WV
□	GAS VALVE	□
⊗	GAS METER	⊗
▽	TYPICAL END SECTION	▽
W-I	HEADWALL OR ENDWALL	W-I
⊕	GRATE INLET	⊕
⊕	CURB INLET	⊕
○	CLEAN OUT	○
⊕	ELECTRIC MANHOLE	⊕
⊕	TELEPHONE MANHOLE	⊕
⊕	ELECTRIC BOX	⊕
⊕	ELECTRIC PEDESTAL	⊕
⊕	MONITORING WELL	⊕
⊕	TEST PIT	⊕
⊕	BENCHMARK	⊕
⊕	BORING	⊕

STANDARD ABBREVIATIONS			
FOR ENTIRE PLAN SET			
AC	ACRES	LOD	LIMITS OF DISTURBANCE
ADA	AMERICANS WITH DISABILITY ACT	LOS	LINE OF SIGHT
ARCH	ARCHITECTURAL	LP	LOW POINT
BC	BOTTOM OF CURB	L/S	LANDSCAPE
BF	BASEMENT FLOOR	MAX	MAXIMUM
BK	BLOCK	MIN	MINIMUM
BL	BASELINE	MH	MANHOLE
BLDG	BUILDING	MJ	MECHANICAL JOINT
BM	BUILDING BENCHMARK	OC	ON CENTER
BRL	BUILDING RESTRICTION LINE	PA	POINT OF ANALYSIS
CF	CUBIC FEET	PC	POINT CURVATURE
CL	CENTERLINE	PCCR	POINT OF COMPOUND CURVATURE, CURB RETURN
CMP	CORRUGATED METAL PIPE	PI	POINT OF INTERSECTION
CONN	CONNECTION	POG	POINT OF GRADE
CONC	CONCRETE	PROP	PROPOSED
CPP	CORRUGATED PLASTIC PIPE	PT	POINT OF TANGENCY
CY	CUBIC YARDS	PTCR	POINT OF TANGENCY, CURB RETURN
DEC	DECORATIVE	PVC	POLYVINYL CHLORIDE PIPE
DEP	DEPRESSED	PVI	POINT OF VERTICAL INTERSECTION
DIP	DUCTILE IRON PIPE	PVT	POINT OF VERTICAL TANGENCY
DOM	DOMESTIC	R	RADIUS
ELEC	ELECTRIC	RCP	REINFORCED CONCRETE PIPE
ELEV	ELEVATION	RET WALL	RETAINING WALL
EP	EDGE OF PAVEMENT	R/W	RIGHT OF WAY
ES	EDGE OF SHOULDER	S	SLOPE
EW	END WALL	SAN	SANITARY SEWER
EX	EXISTING	SF	SQUARE FEET
FES	FLARED END SECTION	STA	STATION
FFE	FINISHED FLOOR	STM	STORM
FH	FIRE HYDRANT	TBR	TO BE REMOVED
FG	FINISHED GRADE	TBRL	TO BE RELOCATED
G	GRADE	TC	TOP OF CURB
GF	GARAGE FLOOR (AT DOOR)	TELE	TELEPHONE
GH	GRADE HIGHER SIDE OF WALL	TPF	TREE PROTECTION FENCE
GL	GRADE LOWER SIDE OF WALL	TW	TOP OF WALL
GRT	GRATE	TYP	TYPICAL
GV	GATE VALVE	UG	UNDERGROUND
HDPE	HIGH DENSITY POLYETHYLENE PIPE	UP	UTILITY POLE
HP	HIGH POINT	W	WIDE
HOR	HORIZONTAL	W/L	WATER LINE
HW	HEADWALL	WM	WATER METER
INT	INTERSECTION	±	PLUS OR MINUS
INV	INVERT	°	DEGREE
LF	LINEAR FOOT	Ø	DIAMETER
LOC	LIMITS OF CLEARING	#	NUMBER

ZONE : CRT 2.5 C-2.0 R-2.0 H-75		
OPTIONAL METHOD OF DEVELOPMENT		
DEVELOPMENT STANDARD	REQUIRED/PERMITTED	PROPOSED
BUILDING HEIGHT	75'	75'
BUILDING SETBACKS		
FRONT:	0'	21.3'
REAR:	0'	7.1'
SIDE (SOUTH-WEST):	0'	60.4'
SIDE (NORTH-EAST):	0'	17.5'
OPEN SPACE	5%	10,200 S.F. (22.1%)
GROSS TRACT AREA	46,893 S.F.	
FLOOR AREA RATIO (FAR)	2.0	UP TO 2.0 FAR (93,786 S.F.)
BUILDING AREA		
CELLAR AREA	49,770 S.F.	
ABOVE GROUND BUILDING AREA	91,663 S.F.	
TOTAL BUILDING AREA	141,433 S.F.	

As can be seen from the plans, the building would be 75 feet tall and would have 51 standard parking spaces, and 2 loading spaces. There would also be 3 ADA compliant spaces, for a total of 56 spaces, thus meeting applicable standards for the required number of parking spaces. Tr. 9/3/19, 167. The Applicant's plans call for two entry points to the site, one from Connecticut Avenue and one from the parking lot east of the site, adjacent to Metropolitan Avenue. Technical Staff voiced concerns, quoted below, about traffic safety at each of these proposed access points, as well as with circulation internal to the site and pedestrian access (Exhibit 59, pp. 9-11):⁶

Vehicular Site Access

The Applicant proposes to locate its primary vehicle access on Connecticut Avenue (MD-185) to the south of the site via a right-in, right-out curb cut with two (2) twelve (12)-foot entry lanes and a triangular median. Additional vehicle access is proposed on the eastern side of the site via a new drive aisle leading from the adjacent parking lot.

⁶ Staff's concerns about circulation were also echoed in its final comments (Exhibit 120).

While vehicle site access is significantly constrained at this location, if the conditional use is approved, the access proposal will require further evaluation during review of the Preliminary Plan. Section 59- 6.1.3(A)2 requires developments to limit vehicle access across a primary pedestrian, bicycle, or transit route wherever feasible, and generally site access should be provided on the lowest volume street adjacent to the site. Locating access on Connecticut Avenue is not ideal as this introduces a conflict point for drivers, pedestrians and cyclists with a high-volume 35-mph state road. As discussed below, the County's *Bicycle Master Plan* calls for a bidirectional separated bikeway on Connecticut Avenue. Right-in, right-out entry is typically designed with a triangular "porkchop" median to visually deter left turns; however, this results in faster approach speeds for vehicles entering the site. Vehicles traverse both a bicycle facility and sidewalk, and to the extent possible, a sharper turn would slow approach speeds into the site. The angled exit introduces safety concerns because the field of vision for drivers leaving the site will be reduced as drivers will have to rotate to see northbound traffic.

Per Section 59-6.1.4. of the Zoning Ordinance, the maximum width allowed for two-way access is 32 feet. According to the Applicant's proposal, when including the width of the median and drive aisles, the proposed access on Connecticut Avenue exceeds what is allowed by the Zoning Ordinance for two-way access in the CR Zone by approximately three (3) feet. Since the proposed entry is too wide and increases the potential for future bicycle-vehicle and pedestrian-vehicle conflicts, the Applicant should evaluate the feasibility of alternate options, such as moving the proposed curb cut to Plyers Mill Road (MD-192) or examining separate points dedicated to ingress only or egress only. The Applicant could additionally explore serving the site via the proposed shared access only; however, the existing curb cut on Metropolitan Avenue is too close to the intersection of Metropolitan Avenue and Plyers Mill Road (MD-192). Existing left turns out of the site are challenging, and trucks attempting to make this movement would obstruct traffic. The proposed use is problematic from a traffic safety perspective.

On-Site Vehicle Circulation

As proposed, vehicles either enter via Connecticut Avenue (MD-185) or the shared access driveway via Metropolitan Road (MD 192). Parking is located to the south and rear of the property. The Applicant proposes a 20-foot wide drive aisle to allow for two-way circulation which widens to 24 feet south of the building. The width of the aisles is adequate for standard passenger vehicles.

As currently designed, vehicles can enter with front-in, front-out movements without multiple maneuvers in the parking lot. Because the Applicant has not yet provided truck turning diagrams, nor identified a design or control vehicle, staff is unable to assess whether the proposal provides adequate space for trucks to maneuver safely. This is particularly important given that the Applicant proposes a cantilever over the parking and loading areas, which will need to be supported by columns proximate to the loading area. Should the Hearing Examiner approve the conditional use, the Applicant should provide a truck circulation plan with the Preliminary Plan

submission for Staff review. Any modifications to adjacent intersections should account for the needs of the design vehicle.

Pedestrian Facilities

The Applicant proposes to provide bicycle facilities fronting Connecticut Avenue (MD 185) and Plyers Mill Road (MD 192), which will push street pedestrian circulation within the bounds of the Applicant's property. No clear pedestrian path is defined fronting Connecticut Avenue within the Applicant's hardscaped plaza. Along Plyers Mill Road (MD 192), the Applicant proposes a 6-foot wide sidewalk extending from the Applicant's eastern property line into the hardscaped area fronting the site. As proposed, it is difficult to differentiate space intended for public mobility from private space. Additionally, pedestrian efficiency is lost as pedestrians are forced to move through the Applicant's plaza rather than directly adjacent to the street. If the conditional use is approved, the Applicant should show clearly delineated pedestrian paths on its Preliminary Plan submission. These parallel the cartway to the extent possible and should include an adequate buffer separating pedestrians from traffic.

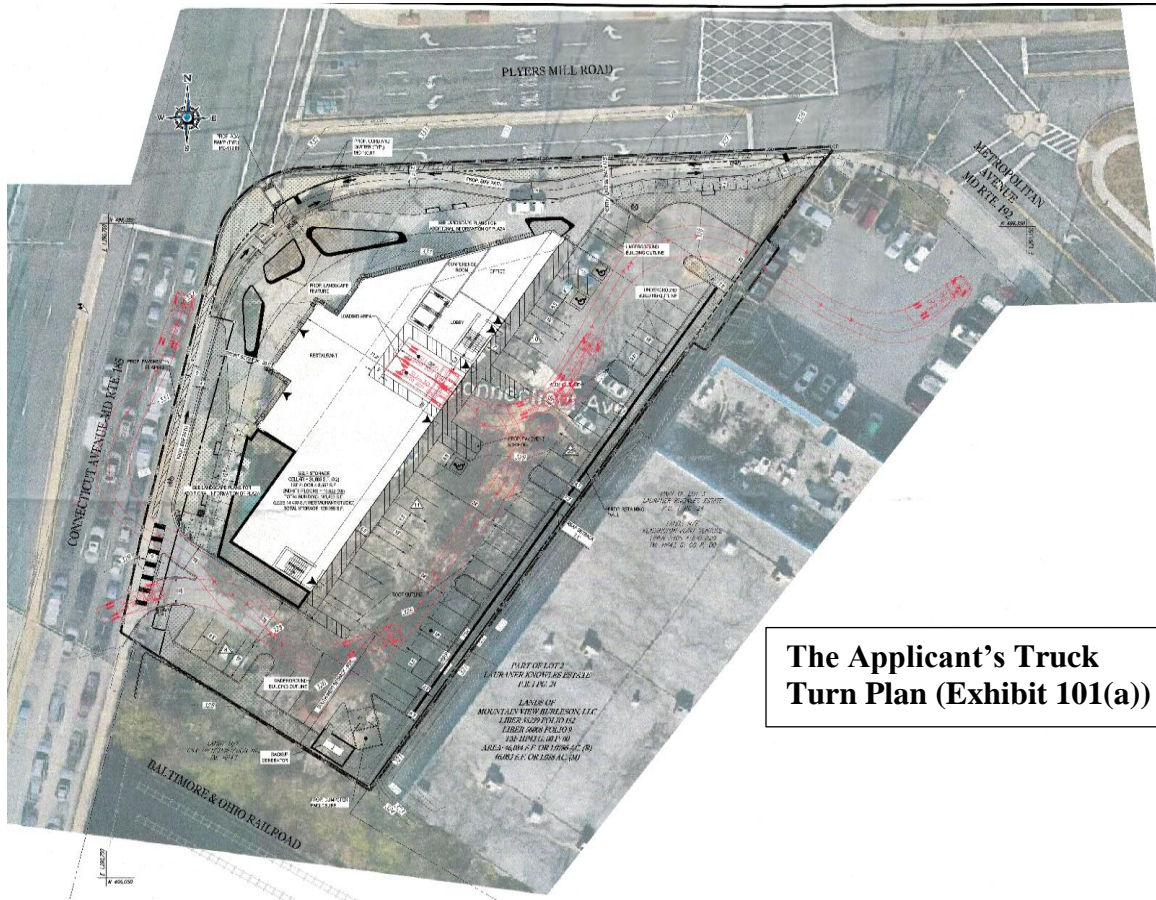
The Applicant proposes one curb ramp at the northwest corner of its property to facilitate pedestrian crossings over Plyers Mill Road (MD-192). As shown, the curb ramp orients pedestrians into the center of the intersection which is unsafe for individuals with visual impairments. In order to be acceptable, the Applicant should provide a curb ramp perpendicular to Plyers Mill Road (MD192). If the conditional use is approved, the Applicant should coordinate with SHA to determine whether additional pedestrian crossing infrastructure is required across the southern leg of Connecticut Avenue or if any pedestrian upgrades at the intersection are required to promote safe access to the site. Staff notes that pedestrian access to the site would be improved by tightening the curb radius at the northeast corner of the intersection of Connecticut Avenue (MD-185) and Plyers Mill Road (MD-192). This would slow turns, reduce crossing distances, and allow space for the installation of separate curb ramps.

As shown on the plan, the Applicant's driveway crossing is not acceptable. If the conditional use is approved, the Applicant should eliminate the curb ramps, detectable warning strips, and high-visibility markings shown, and instead provide a flush concrete sidewalk across the site's driveway (maximum cross slope of 2 percent).

Internal pedestrian circulation is provided in the parking lot via a 7-foot wide striped corridor between the proposed surface parking spaces and building. The corridor is at the grade of the parking lot to facilitate the movement of items into and out of the storage facility. Because the corridor is adjacent to vehicle parking, if the conditional use is approved, the Applicant should provide wheel stops to protect pedestrians from cars backing into spaces.

In response to Staff's comments, the Applicant introduced a Truck Turn Plan (Exhibit 101(a)), reproduced on the next page, and testimony from a traffic engineer, Brian Biddle, that the

current plans would produce safe circulation for the proposed use. Tr. 8/20/19, 274 and Tr. 9/3/19, 194-196.

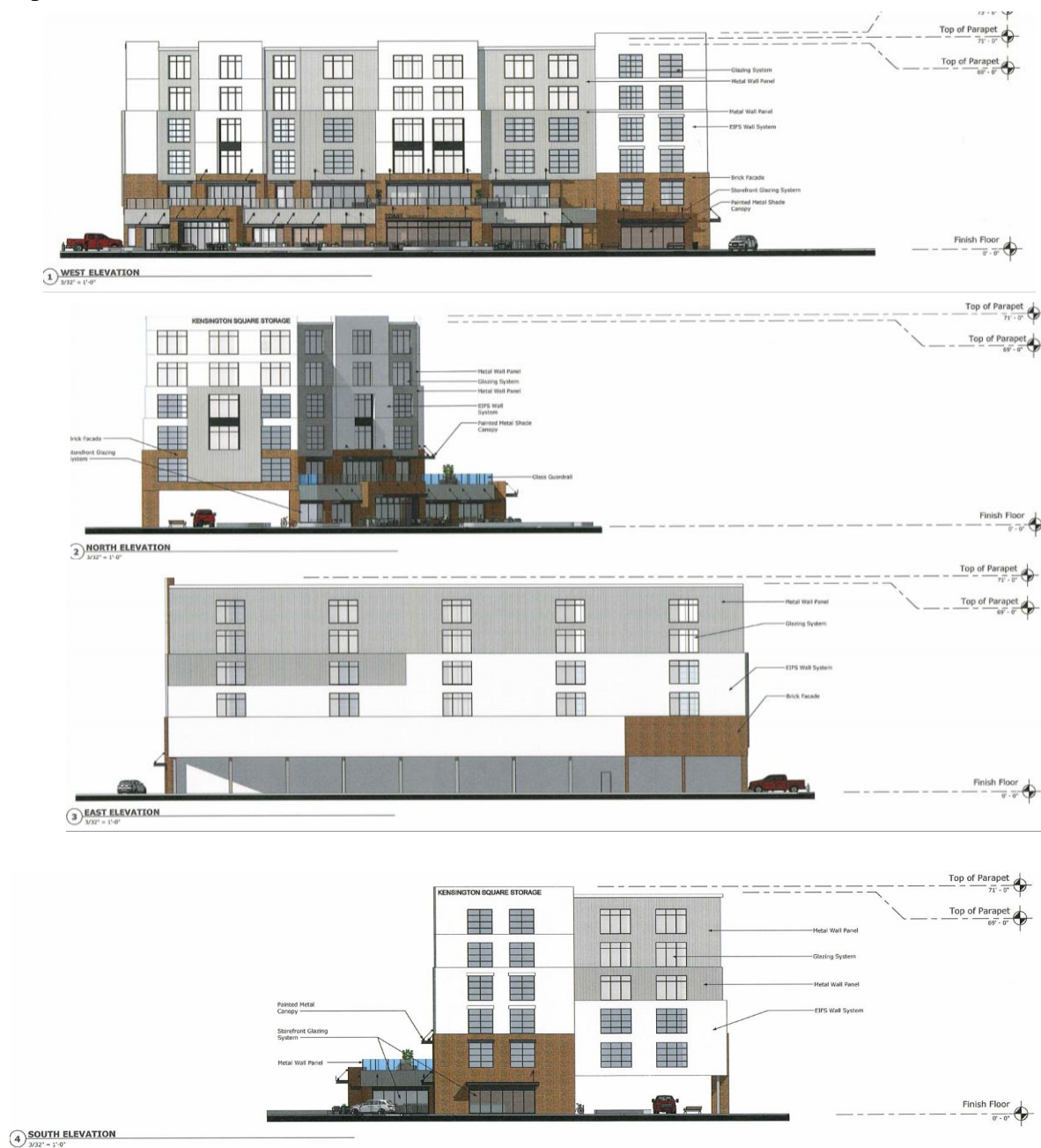


Counsel for the Town of Kensington closely questioned Mr. Biddle about whether the Truck Circulation Plan provided sufficient leeway for trucks to safely maneuver through the subject site and onto the adjacent roadways. Tr. 9/3/19, 178-193. The opposition also introduced testimony from Kensington Councilmember Darin Bartram describing his observations of the difficulties the proposed use would face regarding access and site circulation. Tr. 9/3/19, 148-155.

The Applicant's engineer, Brad Fox, testified that all the circulation deficiencies that were noted by Technical Staff can be resolved without any major changes. Tr. 8/20/19, 92. He also produced an email from a regional engineer for the State Highway Administration (SHA), stating that the SHA engineer "would be okay with keeping the southernmost access point [on Connecticut Avenue] and closing the one closer to Plyers Mill." Exhibit 89.

If this conditional use were ultimately approved, the access and circulation details would certainly have to be worked out at Preliminary Plan review. At this stage, the Hearing Examiner finds that the evidence is sufficient to conclude that final access and circulation plans can be devised to safely handle access and site circulation. If that finding turns out to be incorrect, then this project would ultimately be rejected at the Preliminary Plan stage.

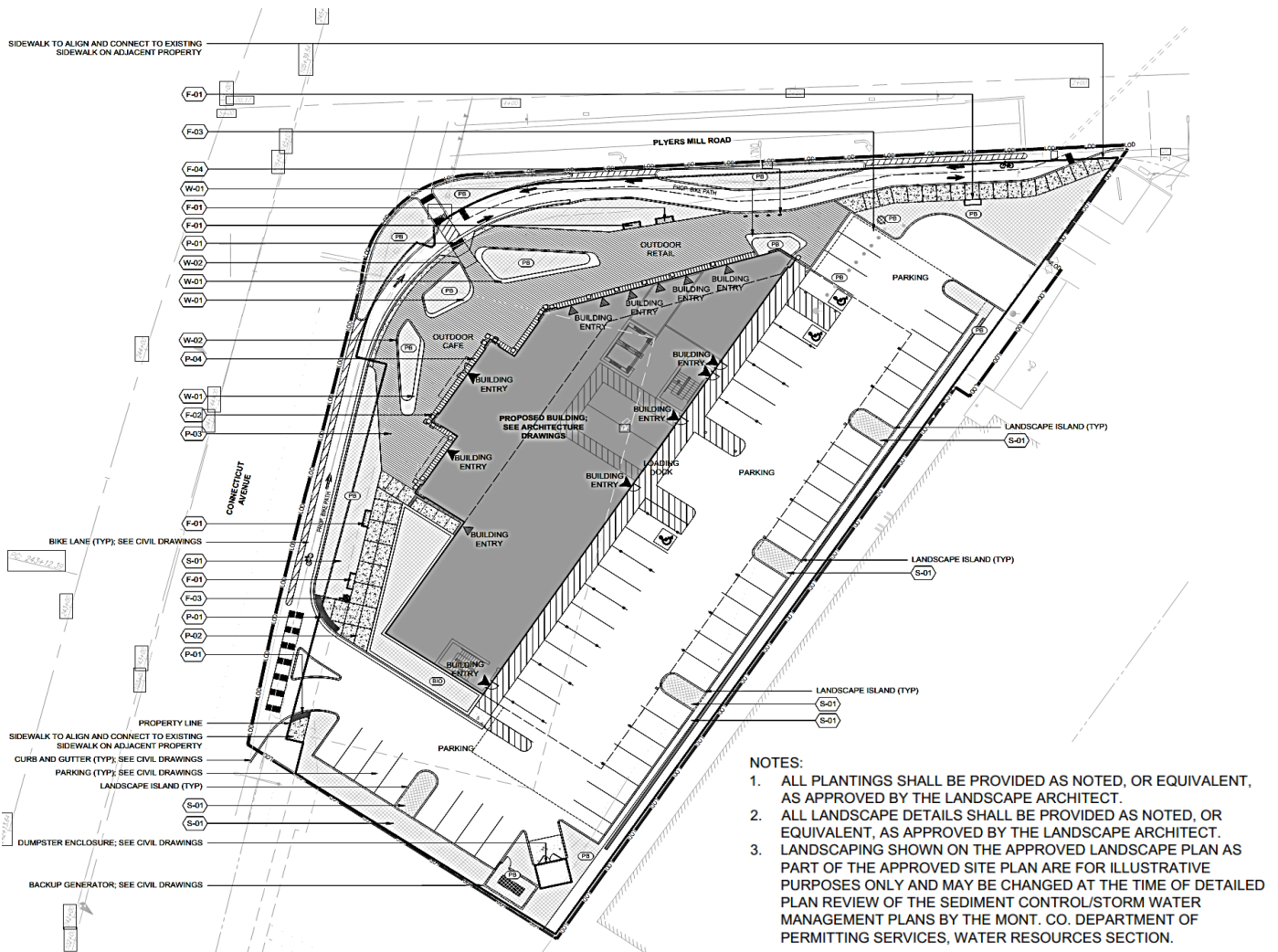
The Applicant's Architectural Elevations for the proposed building ((Exhibit 40(b)) are reproduced below:



3. Site Landscaping, Lighting and Signage

a. Landscaping:

The Applicant submitted revised Landscape Plans (Exhibits 101(c) and (d) and 40(d)(ii), d(iii) and (d)(v)). Significant portions of these plans are reproduced below:



PRODUCT SCHEDULE

TAG	DETAIL	DESCRIPTION	MANUFACTURER	MODEL	SIZE	MATERIAL	FINISH	COLOR	NOTES
SITE FURNISHINGS (F)									
F-01	1/L4-301	BENCH - TYPE 1	VICTOR STANLEY	C-10	20"W X 48"L X 28"H	STEEL	POWDER COAT	FEDERAL GREEN	OR APPROVED EQUAL
F-02	5/L4-301	PLANTER POT	LANDSCAPE FORMS	SORELLA	15"W X 15"L X 30"H	STEEL	POWDER COAT	MERCURY	OR APPROVED EQUAL
F-03	3/L4-301	RECEPTACLE	VICTOR STANLEY	PRS-36	21"W X 31"H X 28"DIA	STEEL	POWDER COAT	FEDERAL GREEN	OR APPROVED EQUAL
F-04	4/L4-301	BICYCLE RACK	VICTOR STANLEY	BKR-35	11'-5/8"W X 35-1/2"H	STEEL	POWDER COAT	FEDERAL GREEN	OR APPROVED EQUAL
PAVING (P)									
P-01	N/A	DETECTABLE WARNING PAVER	SEE CIVIL	SEE CIVIL	SEE CIVIL	SEE CIVIL	SEE CIVIL	SEE CIVIL	
P-02	4/L4-001	CONCRETE PAVING - PEDESTRIAN	N/A	N/A	SEE PAVING FIELD	CONCRETE	STD	NATURAL GREY	
P-03	5/L4-001	UNIT PAVER - TYPE 1	UNILOCK	PROMENADE PLANK PAVER	8"W X 24"L X 3.75"D	CONCRETE	UMBRIANO	FRENCH GRAY	OR APPROVED EQUAL
P-04	5/L4-001	UNIT PAVER - TYPE 2	HANOVER	PREST PAVER	12"W X 24"L X 2"D	CONCRETE	TUDOR	NATURAL GRAY	OR APPROVED EQUAL
PLANTING AND SOILS (S)									
S-01	N/A	PLANTED AREA	N/A	N/A	SEE PLANTING PLAN	SEE SCHEDULE	N/A	N/A	
WALLS AND STEPS (W)									
W-01	2/L4-301	SEAT WALL	N/A	N/A	SEE PLAN	CONCRETE	STD	NATURAL GRAY	
W-02	N/A	PLANTER CURB	N/A	N/A	SEE PLAN	CONCRETE	STD	NATURAL GRAY	



1 BENCH
1.4-301 PICTORIAL

NOTES:
1. SURFACE MOUNT PER
MANUFACTURER
INSTRUCTIONS
2. OR APPROVED EQUAL
NTS



4 BICYCLE RACK - TYPE 1
1.4-301 PICTORIAL

NOTES:
1. SURFACE MOUNT PER
MANUFACTURER
INSTRUCTIONS
2. OR APPROVED EQUAL
NTS



2 LOW SEAT WALL
1.4-301 PICTORIAL

















NOTES:
1. DESIGN INTENT
PRECEDENT ONLY
2. OR APPROVED EQUAL
NTS

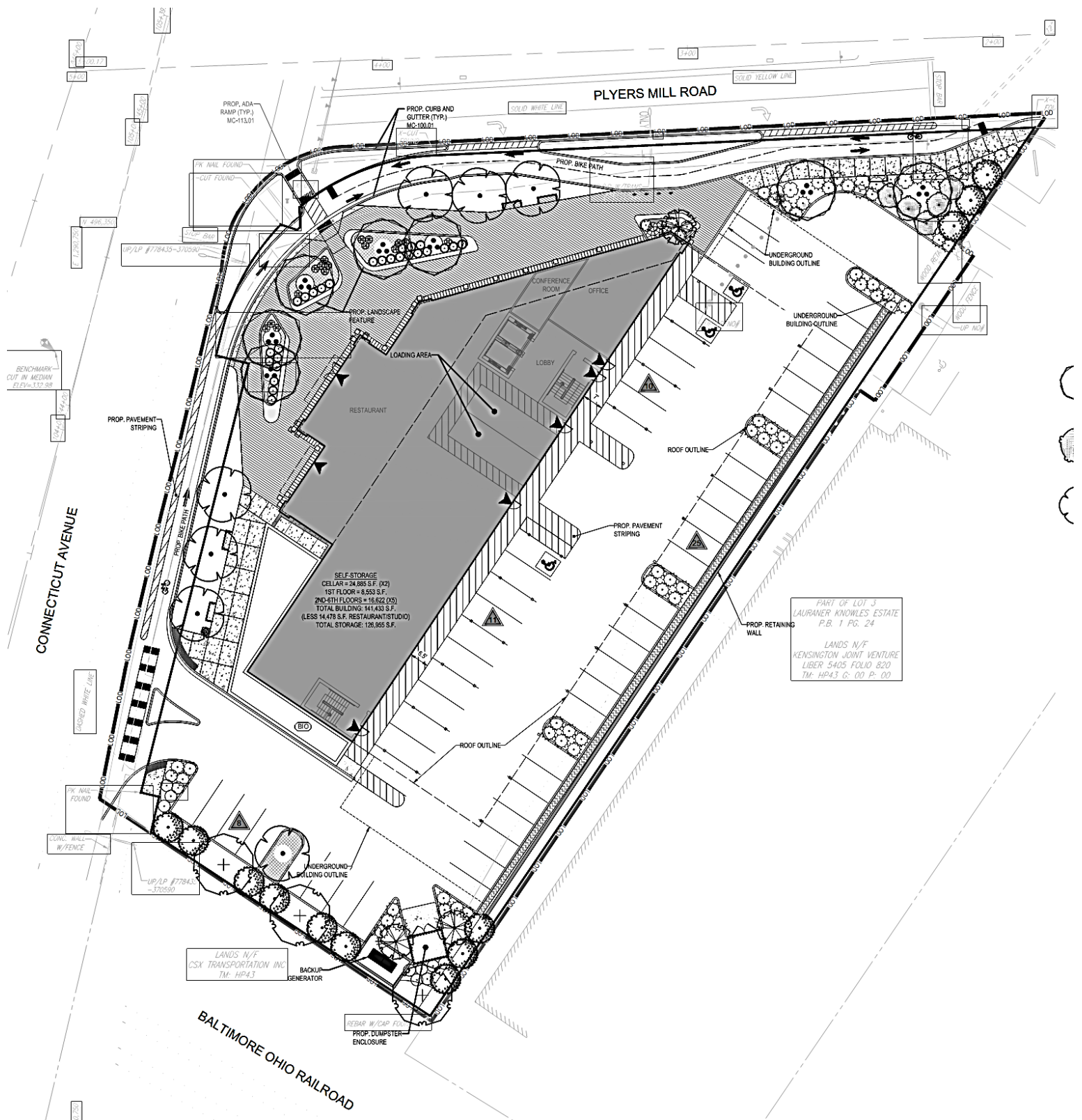


5 PLANTER POT
1.4-301 PICTORIAL

NOTES:
1. FREE STANDING
2. OR APPROVED EQUAL
NTS

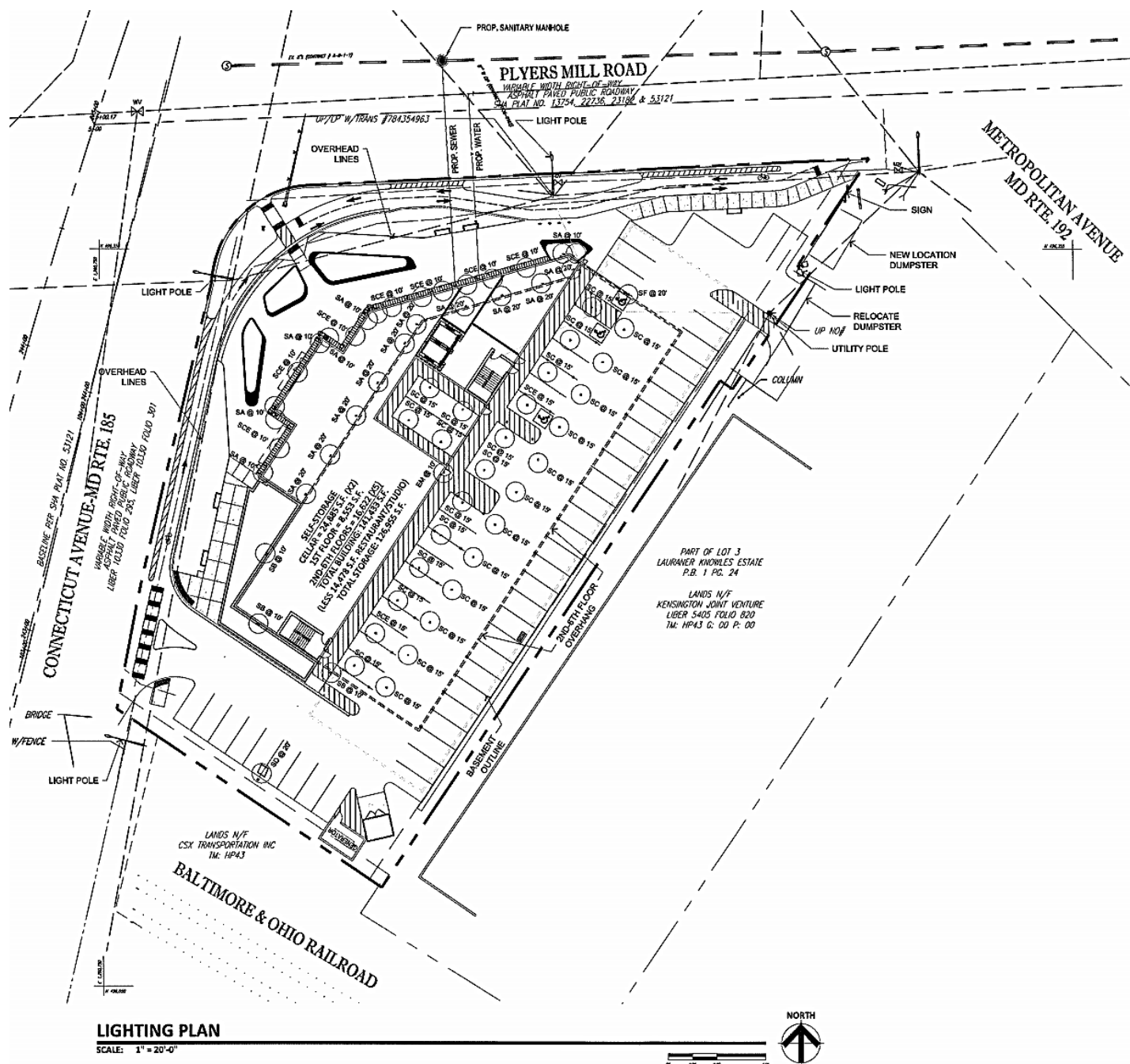
PLANT SCHEDULE

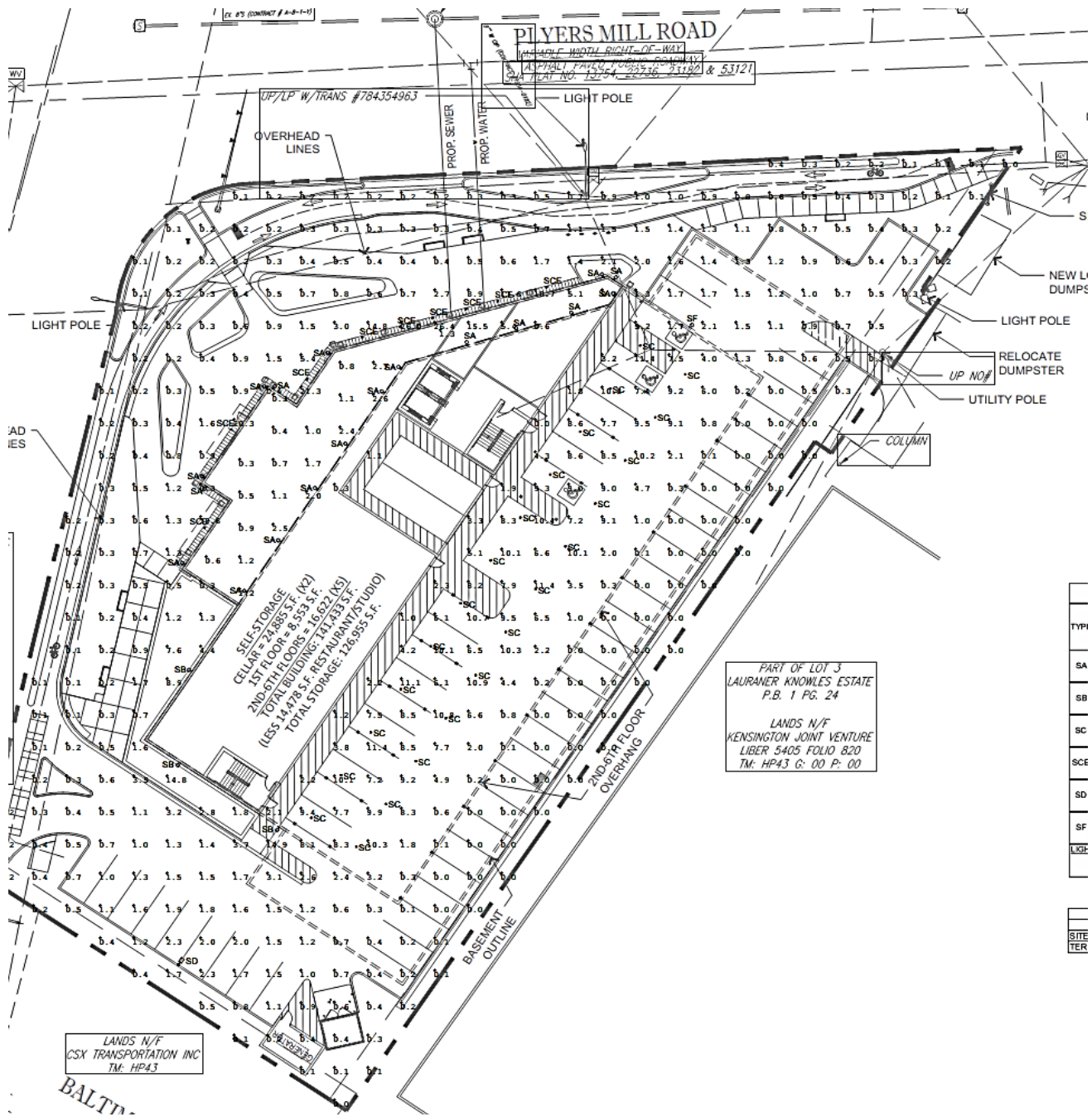
TREES	CODE	QTY	BOTANICAL / COMMON NAME	CONTAINER	CAL	HT.	REMARKS	
	APRS	3	ACER PALMATUM 'RED SELECT' / RED JAPANESE MAPLE	B & B	2.5" CAL	6'		
	BENI	7	BETULA NIGRA 'DURAHEAT' / DURAHEAT RIVER BIRCH	B & B	3" CAL	8' - 10'	MULTI-STEM 3 STEM	
	JVES	12	JUNIPERUS VIRGINIANA 'EMERALD SENTINAL' / RED CEDAR JUNIPER	B & B	2.5" CAL	6' - 8'		
	MGLG	5	MAGNOLIA GRANDIFLORA 'LITTLE GEM' / DWARF SOUTHERN MAGNOLIA	B & B	2.5" CAL	6'	SPECIMEN; CREAMY WHITE FLOWERS	
	OSVI	3	OSTRYA VIRGINIANA / AMERICAN HOPHORNBEAM	B & B	3" CAL	8'		
	PXIO	7	PRUNUS X INCAM / OKAME CHERRY	B & B	2.5" CAL	8'		
SHRUBS	CODE	QTY	BOTANICAL / COMMON NAME	SIZE	HEIGHT	SPREAD	REMARKS	
	ABRC	16	ABELIA X 'ROSE CREEK' / ROSE CREEK ABELIA	CONTAINER	18"	12" - 18"		
	AEAI	5	AZALEA ENCORE 'AUTUMN IVORY' TM / AUTUMN IVORY AZALEA	CONTAINER	24"	18" - 24"		
	CHNJ	26	CEPHALOTAXUS HARRINGTONIA 'NORRIS JOHNSON' / NORRIS JOHNSON PLUM YEW	CONTAINER	18"	18" - 24"		
	EUKM	11	EUONYMUS KIAUTSCHOVICUS 'MANHATTAN' / MANHATTAN EUONYMUS	CONTAINER	30" - 36"	24" - 36"		
	JHES	56	JUNIPERUS HORIZONTALIS 'EMERALD SPREADER' / EMERALD SPREADER JUNIPER	CONTAINER	18"	36" - 48"		
	PLOL	9	PRUNUS LAUROCEASUS 'OTTO LUYKEN' / OTTO LUYKENS CHERRY LAUREL	CONTAINER	24"	24" - 30"		
	SARU	4	SARCOCOCCA HOOKERANA 'HUMILIS' / FRAGRANT SWEET BOX	CONTAINER	24"	24" - 30"		
GROUND COVERS	CODE	QTY	BOTANICAL / COMMON NAME	SIZE	COLOR	BLOOMS	SPACING	REMARKS
	LIMV	582	LIRIOPE MUSCARI 'VARIEGATA' / VARIEGATED LILY TURF	FLAT			12" o.c.	6-8 BIBS PER PLANT MIN.; CAN SPLIT
	PTGC	343	PACHYSANDRA TERMINALIS 'GREEN CARPET' / GREEN CARPET JAPANESE SPURGE	FLAT			12" o.c.	
SOD/SEED	CODE	QTY	BOTANICAL / COMMON NAME	SIZE	COLOR	BLOOMS	SPACING	REMARKS
	LAWN	2,628 SF	POA PRATENSIS / KENTUCKY BLUEGRASS	-				
FERNS	CODE	QTY	BOTANICAL / COMMON NAME	SIZE	COLOR	BLOOMS	SPACING	REMARKS
	DEBR	11	DRYOPTERIS ERYTHROSORA 'BRILLIANCE' / AUTUMN FERN	1 QUART			9" o.c.	



b. Lighting:

The Applicant also submitted revised Lighting and Preliminary Photometric Plans (Exhibits 40(e)(i) – 40(e)(vi)), and portions of these plans are reproduced below and on the next page. The Photometric Plan was later replaced with a plan entitled “Electrical Site Plan Lighting Calculations” (Exhibit 99(c)), to demonstrate that lighting at the property lines would not exceed 0.5 footcandles, per Zoning Ord. §59.6.4.4.D. It is shown on the next page.





LIGHTING FIXTURE SCHEDULE

TYPE	FIXTURE DESCRIPTION	MANUFACTURER	MODEL	LAMP(S)		DRIVER/BALLAST	INPUT WATTS	MOUNTING
				LAMP #	LAMP TYPE			
SA	EXTERIOR WALL SCONCE	TERON	GRDW16-XX-XX-XX-FRN-BZ-30K-XX	--	LED 3000K	0-10V DRIVER	44.9	WALL, SURFACE
SB	EXTERIOR WALL SCONCE	LITHONIA	WST-LED-P2-30K-VV-MVOLT	--	LED 3000K	0-10V DRIVER	25	WALL, SURFACE
SC	EXTERIOR DOWNLIGHT	LITHONIA	LDN6-35/10-L0AR-LSS	--	LED 3500K	0-10V DRIVER	12.75	RECESSED, CEILING
SCE	EXTERIOR DOWNLIGHT	LITHONIA	LDN6-35/10-L0AR-LSS	--	LED 3500K	0-10V DRIVER	12.75	RECESSED, CEILING
SD	POLE MOUNTED FIXTURE	LITHONIA	DSX1-LED-P2-30K-T3M-MVOLT-HSS	--	LED 3000K	0-10V DRIVER	138	POLE
SF	EXTERIOR WALL SCONCE	LITHONIA	DXW1-LED-20C-1000-30K-TFTM-MVOLT	--	LED 3000K	0-10V DRIVER	73.2	WALL, SURFACE

LIGHTING FIXTURE SCHEDULE NOTES:

Technical Staff addressed the proposed landscaping, open space, screening and lighting as follows (Exhibit 59, p. 16):

Parking Lot Landscaping

Since more than 10 parking spaces are required for the Self-Storage facility, the Application must satisfy the parking lot landscaping standards under Section 59-6.2.9. The Landscape Plan appears to satisfy the perimeter parking requirements, but the parking lot does not contain the required landscape areas, nor does it show that the minimum required tree canopy will be provided.

Open Space

This Project is required to provide 2,304 square feet (or 5% of the Property) as public open space. The proposed public open space exceeds the amount required and satisfies a majority of the requirements under Section 59-6.3.6. However, should this project move forward, an open space at this prominent corner should feature a signature artwork or a similar amenity that highlights Kensington's unique character.

Lighting

The Applicant provided a photometric plan, but it does not show that lighting will be reduced to 0.5 footcandles or less along the lot lines, as required under Section 59-6.4.4.D.

Screening

Division 59-6.5 does not apply to the Project because it is an optional method of development.

The amended plans the Applicant filed on August 28, 2019, and which are reproduced on preceding pages of this Report and Decision, provide parking lot landscaping and a proposed tree canopy that gets closer to complying with applicable Zoning Ordinance provisions for parking lot screening and tree canopy. To the extent that the proposal does not fully comply, the Applicant seeks a waiver of Zoning Ordinance §59.6.2.9.C.3 .b.iii, as may be permitted by Section 59.6.2.10.

The Applicant explained the proposed changes in its Motion to Amend (Exhibit 101, p. 2):

More specifically, the revised plans 1) add four landscaped islands within the proposed surface parking areas (resulting in the loss of four parking spaces), 2) add six canopy trees proximate to parking surfaces, and 3) adjust the plantings and proposed wall along the eastern property line to ensure compliance with Section 59.2.9.C.3.b of the Zoning Ordinance. Associated with these revisions, the Applicant notes that the length of the parking stalls along the eastern property line have been reduced from 18 feet to 16 feet with a two foot overhang, as permitted by Section

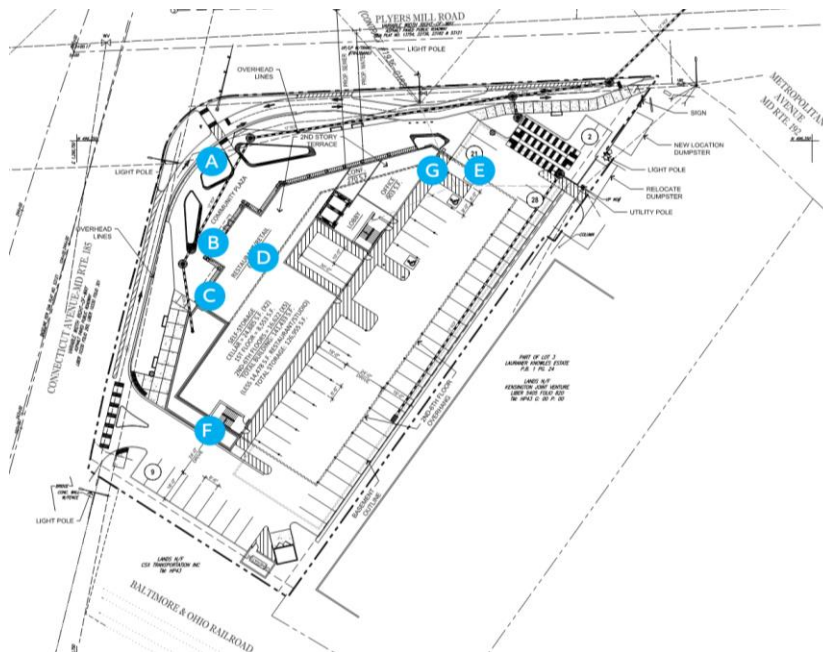
59.6.2.5.E.2 of the Zoning Ordinance. No other material changes have been made to the previously submitted plans. Finally, the Applicant notes that the enclosed plans will require a waiver pursuant to Section 59.6.2.10 of the Zoning Ordinance for the perimeter planting canopy trees otherwise required pursuant to Section 59.6.2.9.C.3.b.iii of the Zoning Ordinance along the eastern property line. The rationale for this waiver is the same as that provided in the revised Statement of Justification for overall canopy coverage (see Pages 16-17 of revised Statement). The proximity of the proposed building face to the adjacent building makes the viability of canopy trees in this area questionable, and the proposed building overhang will achieve the shading otherwise envisioned by this section of the code.

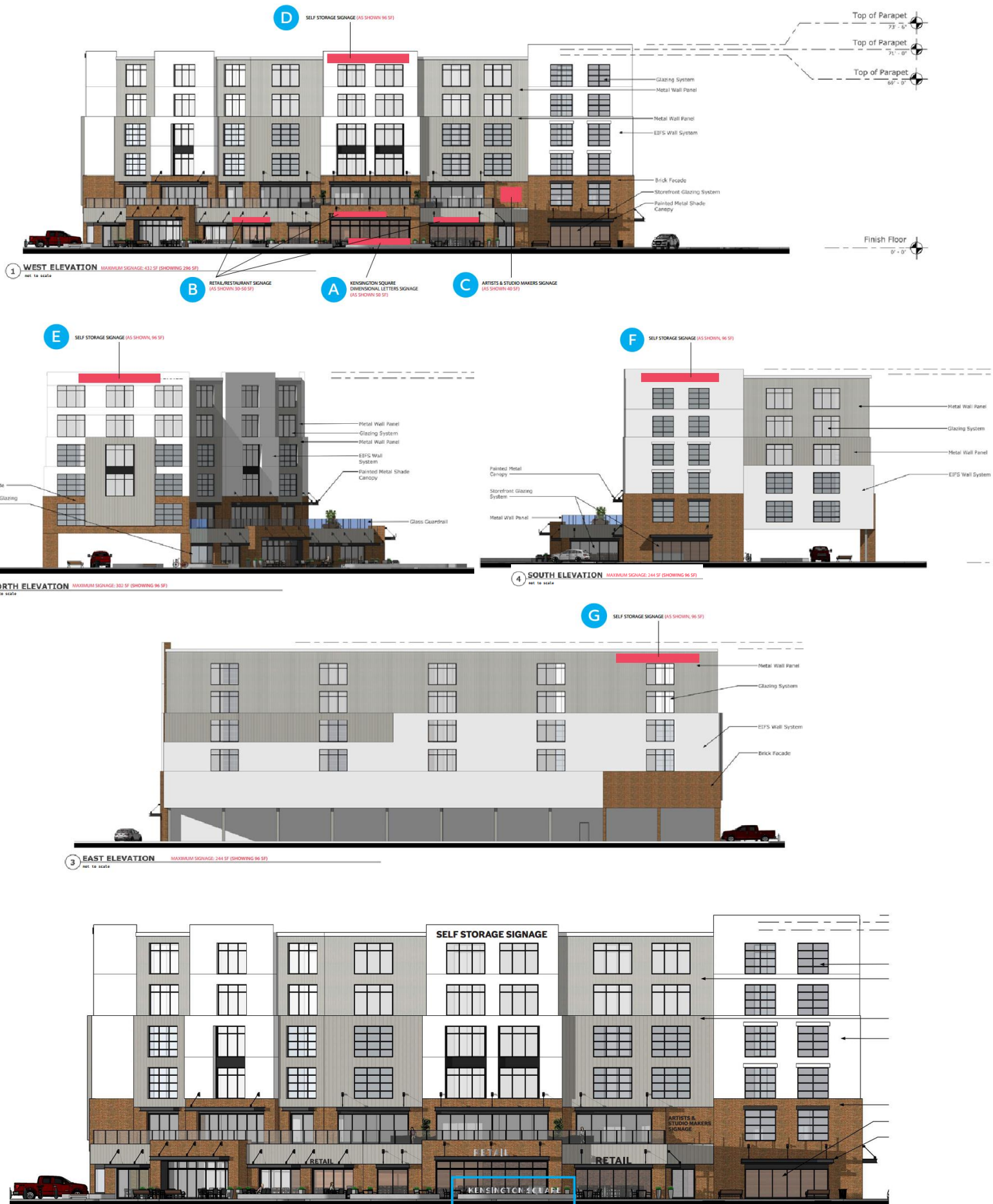
It is noteworthy that, except for a recommendation for a tree panel buffering the proposed bicycle lanes, Technical Staff did not object to the revised Landscaping Plans, nor to the waiver request, in its comments on the amended plans. Exhibit 120.

Finally, the new “Electrical Site Plan Lighting Calculations” (Exhibit 99(c)), do demonstrate that lighting at the property lines would not exceed 0.5 footcandles, per Zoning Ord. §59.6.4.4.D.

c. Signage:

The Applicant’s Second Revised Statement in Support of the Application (Exhibit 99(e)) does not address signage, but the Applicant submitted Signage plans at the August 20, 2019 hearing (Exhibit 87). The overall locations are shown in the Signage Plan (Exhibit 87(a)), below, and samples of the Signage Plans are reproduced on the following pages:





If this application were ultimately approved, the signage proposed by the Applicant would have to be consistent with Zoning Ordinance Division 59-6.7 and would have to be approved by the Department of Permitting Services (DPS), and/or its Sign Review Board.

4. Environmental Controls

The Applicant indicates in its Second Revised Statement in Support of the Application (Exhibit 99(e), p. 3), that “This building will incorporate energy efficient and environmentally friendly design elements such that the Applicant anticipates achieving LEED certification.” The Applicant added (Exhibit 99(e), pp. 5-6):

The Project’s addition of street trees, landscape features, and stormwater management facilities will enhance the environmental condition of the Property and significantly improve upon current conditions on the Property. More specifically, the Project’s design will exceed the required building insulation levels, incorporate low “e” double pane glazing, light colored roofing materials to minimize heat island effects, LED lighting throughout the building with motion sensor technology to reduce energy consumption, and low flow water fixtures to reduce water consumption.

With regard to the environment, Technical Staff reports that “The Property does not contain any significant environmental features.” Exhibit 59, p. 9. Staff also notes that an exemption from Article II of the Montgomery County Code, Chapter 22A (Forest Conservation Law), Section 22A-5(s)(1) was approved for this Property on July 18, 2018, because the Property is less than 1.5 acres with no existing forest, or existing specimen or champion tree, and the afforestation requirement would not exceed 10,000 square feet.

The Applicant did submit an Amended Stormwater Management Concept Plan (Exhibit 40(g), and its engineer, Brad Fox, testified that it would meet the County’s Environmental Site Design (ESD) standards, to the maximum extent practical. Tr. 8/20/19, 80-81. If this conditional use were ultimately approved, the plans for stormwater management would be reviewed by the Planning Board at the Preliminary Plan stage.

5. Operations

The Applicant indicates in its Second Revised Statement in Support of the Application (Exhibit 99(e), p. 3), that:

The rental office at the self-storage component of the Project is anticipated to be open from 8 a.m. to 6 p.m., 7 days a week. The facility will be closed on all Federal holidays. Self-storage customers will have access to their units between the hours of 6 a.m. and 10 p.m., with access being controlled through a secured keypad access system. Two employee(s) will be on-site at a given time.

Other aspects of operations, such as how customers would access the site to drop off and pick up storage items, and how they would circulate within the site, are discussed in Part II.C.2, above.

D. Community Response

The application is supported by a number of community members (Exhibits 60(a)-(s)) and opposed by others (Exhibits 70(a)-(lll)), including the Town of Kensington (Exhibit 33; Attachment 4 to Exhibit 59; Exhibit 66; and Exhibit 123).

1. Community Support:

The central basis for support in the community is not the addition of a self-storage facility, but rather the addition of a restaurant and artists' studios, as well as improvement of the present appearance of development on the site. As summed up by one community supporter (Ceil Goldberg) in a July 19, 2019 letter (Exhibit 60(b)):

I am in favor of the project to develop the corner parcel at Connecticut Ave and Plyers Mill for a combined retail/artists studio/storage development. Kensington has hardly any retail or restaurants spaces to serve its population which comes from Kensington, Silver Spring, Rockville and Bethesda. We are in need of good retail space, especially for restaurants and businesses, such as Busboys and Poets, which serve to enliven and enrich our community.

The project was also supported by the testimony of three community witnesses at the hearing – Judith Heartsong (Tr. 8/9/19, 40-44); Molly Hauck (Tr. 8/9/19, 49-53); and Mary Means (Tr. 8/20/19, 117-131).

Ms. Heartsong testified that she runs Artists & Makers Studios in Rockville, and has drawn up plans, in consultation with the Applicant, for 30 artist studios in the proposed facility, as well as outdoor rooftop space available for the artists' use. She noted that the Applicant has been very responsive in supporting her efforts, and she knows of numerous artists in and around Kensington who need the space. Tr. 8/9/19, 43.

Ms. Hauck testified she has lived in Kensington for 37 years, and the appearance of Connecticut Avenue is marred by the number of unsightly gas stations. She feels the area would be greatly improved by getting rid of the gas station on the site, whose "Googie" architecture is not consistent with the architecture of Kensington. She supports the Applicant's proposal, which she believes would place an attractive mixed-use building there. In Ms. Hauck's opinion, that would be consistent with the Sector Plan. She also testified that the site is "totally unsuitable for residential or office space because there are gas stations on both sides of it and across the street, and a fire station is across the street." Tr. 8/9/19, 50-51. Finally, Ms. Hauck observed that a storage facility has the advantage of generating very little traffic in a high traffic area. Moreover, the restaurant and artists' studios would enable Kensington residents to go out to dinner in Kensington and attend art openings that draw people from the community. Tr. 8/9/19, 52.

Mary Means testified that she lives about a mile from the site and she has run a community planning firm for 30 years. She also stated that 40 years ago she "led the team at the National Trust for Historic Preservation that invented the Main Street Approach, which is the conceptual framework and methods that have now been used by thousands of small towns and historic city corridors to bring life back to . . . their downtowns and their older commercial areas." Tr. 8/20/19, 121.

She personally met with the Applicant's representatives and other neighbors about the subject proposal, though she denied having any professional connection with the Applicant. She feels that, with the addition of the restaurant and artists' studio space to the storage facility building, "the creative solution that had emerged for this site's challenging constraints would more than meet the Town and County's desire to bring pedestrian level vitality to this really important location." Tr. 8/20/19, 119. Ms. Means also criticized Technical Staff's focus on the self-storage units, since the restaurant and artist studios are permitted uses in this zone. She opined that "neither residential nor office uses on this site will generate enough sufficient revenue to make the desired restaurant, artist studios and generous public improvements financially possible." Tr. 8/20/19, 120.

According to Ms. Means, "Aside from the upper stories' use being self-storage, the Town and County are getting exactly what was envisioned in the [Kensington Sector] plan." Tr. 8/20/19, 121. She concluded, "I think the proposed development at 10619 Connecticut is an excellent and possibly the only viable solution for enlivening this important gateway to Kensington." Tr. 8/20/19, 122.

2. Community Opposition:

The chief basis for opposition is that the proposal is dominated by a large storage facility at a central point in Kensington, in addition to already existing storage facilities. As summed up by one community opponent (L. Page "Deacon" Maccubbin) in his August 3, 2019 letter of opposition (Exhibit 70(e)):

I think everyone would support a restaurant there, or artist studios (as the developer also proposes), or shops, a medical center, business offices, a market or even the continuation of the existing farmer's and gardener's market. Those are not the problem. But NOT a storage facility, not a soul-numbing 5-story dumping ground that adds nothing of value to our neighborhood. Especially not when we already have 3 other storage facilities within a block of that location. Kensington does not want another storage facility occupying that choice commercial corner. We don't want to become known as the dumping ground of the Nation's Capital.

Two community witnesses testified in opposition to the application at the hearing. Deborah Chalfie (Tr. 8/9/19, 44-49) testified that she is opposed to the proposal because:

. . . smart redevelopment could create some cohesion and livability in that area that's not there right now. But the proposed use, I think, it's fundamentally unsuited for the site because of several reasons. The proposed building is hulking, it's looming, it's anonymous, and is unappealing. It wouldn't activate or animate the area. Self-storage is a dead use. . . . It would decimate, not elevate, the quality of commercial development in the core. And by my calculation, the mixed use part of the proposed building would constitute only 11 percent of the square footage. 90 percent would be self-storage. And I question whether one restaurant and a handful of artists can really carry the load in terms of doing what the sector plan calls for. I urge you to wait for something better. Tr. 8/9/19, 46.

Ms. Chalfie argued that the addition of another self-storage facility would turn Kensington into a “self-storage Mecca,” and that more people would come to Kensington if Connecticut Avenue were made more attractive at this location. Finally, she urged that the gas station should be preserved (Tr. 8/9/19, 47):

The station is highlighted in the inventory of buildings noted in the book, Montgomery Modern. It's a piece of the town's history and it's an excellent and rare example of the Googie style of midcentury modern architecture and represents the kind of scale and historic character that the plan says it wants to preserve.

Julia O'Malley testified (Tr. 8/9/19, 53-59) that she has lived in Kensington for over 40 years, has served on the County's Historic Preservation Commission, and is opposed to the application. She is also the president of the Historical Society of Kensington, and although the Historical Society voted unanimously to oppose this development, she testified on her own behalf, not on behalf of the organization. Tr. 8/9/19, 53-54.

In Ms. O'Malley's opinion, the proposed building would be problematic for numerous reasons:

. . . The developer's project will have a 75 foot flat back wall facing Kensington's main street and antique row, Howard Avenue. The sector plan called for being engaged with the railroad and Howard Avenue. . . . Tr. 8/9/19, 54-55.

The project would also create traffic and pedestrian problems (Tr. 8/9/19, 55):

This plan relies on pass-through exit to an entrance from southbound Connecticut, Metropolitan, or Plyers Mill Avenue through the barely adequate Baskin-Robbins, 7-Eleven, Manny's Pizza and Subs parking lot. To exit onto Metropolitan headed towards Connecticut South or Plyers Mill East makes it extremely difficult traffic stopping left turn at that intersection. Please note the side -- the crosswalk with no walking light at that corner is a pedestrian crossing often used by the North residential -- North Kensington residential neighborhood. And they come that way to come to the shops and to the south side of town.

Ms. O'Malley further testified that (Tr. 8/9/19, 55-56):

The developer's effort to make a storage building look like a conventional commercial or residential building is not likely to work. The type of glass that is necessarily used to face the opaque wall behind, most if not all the windows in the South storage building is reflective glass. These look nothing like actual transparent window through which people, furnishings, and most importantly light, can be seen within a building and which give evidence of life and human activity within. Such a building is an odd hybrid and is a cold presence in a hierarchical significant location where the community needs one of higher purpose, one that engages the community. . . . Allowing this highly inappropriate use mismatched with Metropolitan Avenue, ignoring crosswalks to the neighborhoods, and blocking intersections could be precedent-setting and detrimental to our town of 2,000 residents and its future development. The sector plan design guidelines were developed to promote the community's heritage through its buildings, spaces, and people. New development should be sensitive to the historic architecture, interpreting existing elements in a new way. If this project goes through, we will be guaranteed a 75 foot self-storage monolith, which will show how the sector plan has failed us. This only has parking on the site for 58 to 60 cars, not adequate for its use.

Finally, Ms. O'Malley noted that the existing gas station is "highlighted in the inventory of Montgomery Modern Buildings and . . . it is in the Montgomery Modern book that was written recently." Tr. 8/9/19, 57. She would like to see the architectural features of the gas station retained, although as part of a restaurant, not as a gas station.

3. Opposition by the Town of Kensington and Related Legal Issues:

The principal point of opposition by the Town of Kensington is the argument that the proposed development would be contrary to the stated objective of the 2012 Kensington Sector Plan to create a vibrant and pedestrian-friendly Town Center. On June 19, 2019, The Mayor and

the Council of the Town of Kensington adopted Resolution R-12-2019, formally opposing the grant of the Applicant's conditional use application as being inconsistent with the 2012 Kensington Sector Plan. Attachment 4 to Exhibit 59. The Town's opposition is summarized in its Pre-Hearing Statement in Opposition. Citing various goals of the Kensington Sector Plan, the Town concluded (Exhibit 66, p. 2):

After multiple efforts through public meetings and individual conversations, it became apparent to the Mayor and Council that this Project does not conform to the Sector Plan and would not be brought into conformance by this developer. Based on the outsize impact on future development that allowing this Project to proceed would have as the first development at this prominent intersection, there is a major non-inherent adverse effect.

The Project does not comply with Section 7.3.1(E) of the Zoning Ordinance and should not be approved as a conditional use. As a result, the Mayor and Council adopted Resolution R-12-2019 to oppose this application.

Under Section 24-201 of the Maryland Code, Land Use Article, resolutions of this sort from the Town of Kensington are entitled to special status. Section 24-201 provides:

Maryland Code, Land Use Article, § 24-201. Town of Kensington.

(a) Concurrent jurisdiction to enforce zoning laws. -- *The Town of Kensington has concurrent jurisdiction to enforce the county zoning laws within its boundaries.*

(b) Vote to overturn zoning resolution. -- *A two-thirds majority vote of both the district council and the county planning board is required to take any action relating to zoning within the Town of Kensington that is contrary to a resolution of the Mayor and Town Council.*

(c) Vote to overturn land use resolution. -- *A two-thirds majority vote of the county planning board is required to take any action relating to land use planning within the Town of Kensington that is contrary to a resolution of the Mayor and Town Council.*

The subsections relevant to this case are Section 24-201(b), which requires a two-thirds Planning Board majority and a two-thirds District Council majority to take any action contrary to the position of the Mayor and Town Council of Kensington in a “zoning” matter; and Section 24-201(c), which requires a two-thirds majority of the Planning Board to take any action contrary to the position of the Mayor and Town Council of Kensington in other “land use planning matters.”

Since the issue of compliance with the Kensington Sector Plan is central to the opposition of the Town of Kensington and to the position taken by the Technical Staff and the Planning Board, that issue is discussed at length in the Part II.E. of this Report and Decision.

Before turning to the substance of that question, we must address the legal issues raised by the Hearing Examiner at the hearing as to the appropriate impact of both the Planning Board's recommendation and the above-quoted Maryland Code provisions on the Hearing Examiner's evaluation of this case. Tr. 8/9/19, 18-19; Tr. 8/20/19, 15-45; Exhibit 93, p. 2, Items e., f. and g. As framed by the Hearing Examiner, these legal issues are:

- a. To what extent, if any, should the Hearing Examiner give deference to the Planning Board's and its Staff's interpretation of the Sector Plan they formulated?
- b. Is the conditional use decision a "zoning" matter governed by Section 24-201(b) of the Maryland Code, Land Use Article, or a "land use planning" matter within the meaning of Section 24-201(c)? and
- c. Assuming Section 24-201(b) is the applicable section, would this case have to go to the Council if the Hearing Examiner ruled against the Town of Kensington and was upheld by the Board of Appeals?

Both parties addressed these issues at the hearing (Tr. 8/20/19, 15-45) and in subsequent filings (Exhibit 96, filed by the Town of Kensington) and Exhibit 121, Part I, filed by the Applicant).

We turn to the first question.

a. To what extent, if any, should the Hearing Examiner give deference to the Planning Board's and its Staff's interpretation of the Sector Plan they formulated?

Since the Planning Department and the Planning Board are the drafters of master plans and are generally responsible for their application once approved by the County Council, the Hearing Examiner must give considerable weight to the Planning Department's and Planning Board's interpretation of their own regulations. As stated by the Maryland Court of Appeals in *Kor-Ko Ltd. v. Maryland Department of the Environment*, 451 Md. 401, 412, 152 A.3d 841, 847-848 (2017) (citations omitted),

Compared with a question of statutory interpretation, “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.” . . . We grant such deference to an agency’s interpretation of its regulations because agency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. . . .

This rule of deference has been directly applied to the Maryland-National Capital Park & Planning Commission in *Maryland-National Capital Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 84-85, 985 A.2d 1160, 1166 (2009).

The Applicant urges against deferring to the Planning Board’s and the Technical Staff’s interpretations of the Sector Plan in this case, arguing that the Planning Board vote was split and the Board did not explicitly “adopt the reasoning set forth in the Staff Report (Exhibit 59), but rather offered its own rationale for recommending denial.” *Applicant’s Closing Statement (Exhibit 121, p. 2)*. The Applicant contends that these agency recommendations are not entitled to deference, suggesting that both bodies had “. . . focus[ed] solely on the self-storage component of the proposed development, ignoring the other attributes of the Project that unquestionably further the objectives of the Sector Plan . . .” Exhibit 121, p. 3.

In contrast, the Town of Kensington argues that, given the language of Land Use Article Section 24-201, the Hearing Examiner is bound by the Planning Board’s recommendation in this case, and has no authority to differ therefrom. Exhibit 96, pp. 2-5 and Tr. 8/20/19, 21 and 38. The Town’s conclusion is based on its reading of the section’s language, which specifies that in both zoning and other land use matters, at least a two-thirds majority vote of the County Planning Board is required “to take any action” that is contrary to a resolution of the Kensington Mayor and Town Council. The Town interprets this language as applying to “any action” by the Hearing Examiner and the Board of Appeals, in addition to the Planning Board, and in zoning matters, to the County Council, as well.

The Hearing Examiner does not agree with either the Applicant or the Town of Kensington on the deference question. The Applicant incorrectly asserts that Technical Staff and the Planning Board ignored the non-storage attributes of the project. These agencies obviously concentrated mostly on the conditional use (i.e., the self-storage use) because that is the specific item upon which they were required to make a recommendation, but they also addressed the other uses.

Technical Staff stated (Exhibit 59, p. 7) that “The proposed restaurant and artist studio spaces show an effort by the Applicant to provide activating uses along Connecticut Avenue and Plyers Mill Road, but those uses are not sufficient to overcome the deadening impact of 126,955 square feet of self-storage.” Staff went on to say (Exhibit 59, p. 8):

Although the ancillary uses proposed in association with the self-storage facility support some of the Plan’s goals, the nature of the self-storage use is inconsistent with the primary recommendations of the Sector Plan. The proposed use itself will not create a critical mass of activity along the sidewalks. In contrast, the self-storage facility will likely have a deadening effect on the streetscape because it generates a low amount of traffic that is rarely, if ever, pedestrian. . . .

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If developed with the proposed ancillary uses, the building would technically be mixed-use. However, the primary component of most mixed-use developments is either office or residential, both of which typically generate patronage and foot traffic that supports and enlivens ground floor retail/restaurant uses. In contrast, the proposed self-storage facility will generate a negligible amount (if any) potential customers to patronize the proposed retail/restaurant uses.

In its turn, the Planning Board’s letter (Exhibit 64(a)) listed the Applicant’s arguments, as well as the claims of supporters, inter alia, that “. . . the project would bring [benefits] to the community including the opportunity for a restaurant and art studio space and the proposed improvements to the appearance of Connecticut Avenue associated with the development.”

In sum, the Hearing Examiner cannot accept the Applicant’s argument that the Technical Staff report and the Planning Board letter are not entitled to any weight.

Nor can the Hearing Examiner agree with the Town of Kensington’s interpretation of

Section 24-201 of the Maryland Code. In the opinion of the Hearing Examiner, the Maryland Code language appears clearly intended to circumscribe the powers of only the two bodies specified in the Section, the Planning Board and the Council. If the state legislature had intended that language to preclude quasi-judicial proceedings in individual conditional use cases before OZAH, it could have said so. It did not. To paraphrase attorney Brendan Sullivan, the Hearing Examiner is not a potted plant, but rather is charged with the responsibility of taking evidence and making a decision in conditional use cases based on the record, and in accordance with the requirements of the Zoning Ordinance. Under that process, the Planning Board is permitted only to make a recommendation to the Hearing Examiner, and the Council has no role to play. Zoning Ordinance §59.7.3.1.

The “bottom line” on the deference issue is that the opinions of the Technical Staff and the Planning Board interpreting the Kensington Sector Plan, as well as other regulations within their purview, are entitled to considerable weight. Their interpretations would be given less weight if their analysis pertained the legal meaning of a statute, but in this case they are interpreting a plan that they devised, albeit with input from the community and approval of the County Council. As such, they are in an excellent position to interpret what portions of the Kensington Sector Plan were intended to mean, and the case law indicates that we should give considerable weight to their analysis. We have done so. Moreover, having heard all the testimony, and having reviewed all the evidence and arguments, the Hearing Examiner has reached conclusions on the Master Plan issues similar to those expressed by Technical Staff, the Planning Board and the Town of Kensington, as set forth in Part II.E.3 of this Report and Decision.

b. Is the conditional use decision a “zoning” matter governed by Section 24-201(b) of the Maryland Code, Land Use Article, or a “land use planning” matter within the meaning of Section 24-201(c)?

The next legal question is whether the conditional use decision is a “zoning” matter governed by Section 24-201(b) of the Maryland Code, Land Use Article, or a “land use planning” matter within the meaning of Section 24-201(c)? On this question, the Hearing Examiner agrees with the Applicant’s analysis, set forth in its Closing Statement (Ex. 121, pp. 3-5). As stated there,

. . . the legislative history of Md. Code Ann., Land Use § 24-201 and pertinent case law indicate that action on a conditional use application is a land use action, not a zoning action. Md. Code Ann., Land Use § 24-201 was initially enacted with respect to the City of Takoma Park in 1986. H.B. 1148, Gen. Assemb., 1986 Sess. (Md. 21986). In 2007, the General Assembly extended the same powers to the Town. H.B. 708, Gen. Assemb., 2007 Sess. (Md. 2007). A Fiscal and Policy Note associated with the 2007 bill generally seems to characterize zoning and land use actions in terms of the respective powers of the District Council and the Planning Board, with those matters on which the District Council has final authority being zoning, and those on which the Planning Board has final authority being land use. Because the District Council has no role in acting on conditional use applications, whereas the Planning Board provides recommendations, it is reasonable to assume that the legislative history indicates that action on a conditional use application is a land use action.

Case law further supports this interpretation. In *Anne Arundel County v. Bell*, the Court of Appeals referred to special exceptions, another term for conditional uses, as “administrative land use actions.” 442 Md. 539, 554–55 (2015) (“Administrative land use actions, whether reached via quasi-judicial or executive processes, encompass a wide variety of things, including [. . .] special exceptions [. . .] whether granted by local administrative hearing officers, boards of appeal, or the local legislative body by donning its land use authority ‘hat’.”). Additionally, in *County Council of Prince George’s v. Zimmer Dev. Co.*, the Court of Appeals explained the substantive distinction between zoning and land use planning as follows:

Zoning is the more finite term. Generally, the term “zoning” is used to describe the process of setting aside disconnected tracts of land varying in shape and dimensions, and dedicating them to particular uses designed in some degree to serve the interests of the whole territory affected by the plan. Parcels must be put to use in compliance with their zoning. [. . .] Planning is the broader term. Planning concerns the development of a community, not only with respect to the uses of lands and buildings, but also with respect to streets, parks, civic beauty, industrial and commercial undertaking, residential developments and such other matters affecting the public convenience. 444 Md. 490, 505 (2015)(citations omitted) (internal quotations omitted).

Under these definitions, action on a conditional use application is land use planning – not zoning. . . .

The Hearing Examiner adopts this argument, and concludes that, in the context of this statutory interpretation, a conditional use proceeding is a land use planning matter, not a zoning, matter.

c. Assuming Section 24-201(b) is the applicable section, would this case have to go to the Council if the Hearing Examiner ruled against the Town of Kensington and was upheld by the Board of Appeals?

The final legal question, which is premised on a finding that Section 24-201(b) is the applicable section, is mooted by the Hearing Examiner's conclusion that Section 24-201(c), not Section 24-201(b), is applicable here. Under Section 24-201(c), involvement of the Council is not an issue. Moreover, the Hearing Examiner has not ruled against the Town of Kensington, and thus the issue is doubly moot. He will therefore not reach the Section 24-201(b) issue.

There is one final note on the impact of Maryland Code, Land Use Article Section 24-201 on these proceedings. As mentioned by the Hearing Examiner at the beginning of this section, Section 24-201 gives resolutions of the Town of Kensington in land planning matters a special status—It takes a two-thirds vote of the Planning Board to take action contrary to the resolution. As discussed above, the Hearing Examiner does not interpret this provision as being binding on the Hearing Examiner's conditional use proceeding because the provision is directed at the Planning Board, which has only recommending authority in this case, and moreover, it is not possible to apply a two-thirds vote standard to the decision of a single Hearing Examiner.

In sum, the Hearing Examiner is not legally required to give any extra weight to the testimony and evidence of the Town of Kensington or its officials in this case based on Section 24-201. He does accord their testimony and evidence such weight as is appropriate given their direct knowledge regarding the Town they administer and their direct involvement in the drafting of the 2012 Kensington Sector Plan.

E. Master Plan Compliance

The crux of the dispute in this case is whether or not the proposed use would be consistent with the recommendations of the 2012 Kensington Sector Plan, the Master Plan that governs the subject site. In order to approve a conditional use application, Zoning Ordinance §59.7.3.1.E.1.c. requires, *inter alia*, a finding by the Hearing Examiner that the proposed use “*substantially conforms with the recommendations of the applicable master plan.*”

The Applicant argues that its plan is consistent with the Kensington Sector Plan, while Technical Staff, the Planning Board and the Town of Kensington argue that it is not.

1. The Applicant’s Argument that the Proposed Use is Consistent with the Sector Plan

The Applicant discusses the Sector Plan Compliance issue at length in its Second Revised Statement in Support of the Application (Exhibit 99(e), pp. 4-14), and contends therein that “The Project substantially conforms to the Sector Plan and Design Guidelines.” The Kensington Sector Plan Design Guidelines were adopted by the Montgomery County Planning Board in March of 2013 (“Design Guidelines”).⁷

In addition to the Applicant’s discussion in its Second Revised Statement (Exhibit 99(e)), the Applicant called three expert witnesses who directly addressed Master Plan compliance issues – Matthew Clark, a landscape architect; Michelle Bach, an architect; and Patrick Phillips, an expert in real estate economics and urban planning and development.

Mr. Clark testified that, in his opinion, the proposed landscaping would be consistent both with the Kensington Sector Plan and the Kensington Design Guidelines, and would be compatible with the neighborhood. Tr. 8/20/19, 148-163. He stated that the proposal supports a mixed-use

⁷ The Hearing Examiner takes official notice of the Kensington Sector Plan Design Guidelines, which were approved by the Town of Kensington in 2012 (Exhibit 108, Circle pp. 9-11) and by the Planning Board in March of 2013. They were referenced repeatedly both in filings in this case and in testimony at the hearing.

development, with street level shops on Connecticut Avenue and parking in the rear. Mr. Clark opined that it would support the four main objectives of the Kensington Design Guidelines, which he outlined as 1. Kensington's character; 2. Pedestrian connections; 3. Pedestrian-oriented development; and 4. Transitions.

From his perspective as a landscape architect, the pedestrian connections and the pedestrian-oriented development are the most relevant. He noted that the primary goal was to create a high-quality pedestrian network, including direct and safe routes for pedestrian travel, the use of trees and plants to complement the pedestrian character and historic neighborhood, and amenities with visual interest for pedestrians. In Mr. Clark's opinion, the Applicant's plan would accomplish this goal. It would also satisfy the objective of creating a variety of public open spaces, with seating, plantings and other amenities. The building is also oriented and stepped back to enhance the pedestrian experience. The plans would reduce the visual impact of parking structures, with almost half of the parking under cover and other parking screened by landscaping. Finally, the Applicant has selected site furnishings straight from the design guidelines. Mr. Clark indicated that he could work with Technical Staff to resolve any differences regarding the proposed pedestrian pathway.

Applicant's architect, Michelle Bach, testified that in her opinion, the proposed building's orientation, massing, pedestrian scale, the selected materials pallet of industrial windows, brick and stucco, the setbacks, signage, the landscaping and the feel of the building would comply with the Kensington Sector Plan and Design Guidelines and would be architecturally compatible with, and in harmony with, the character of the surrounding neighborhood. Tr. 8/20/19, 203-206.

Ms. Bach also testified that all the windows above the second floor of the building (*i.e.*, on floors 3, 4, 5 and 6) would be "faux" or "spandrel" windows. Tr. 9/3/19, 169-177. That means that no indoor activity will be visible from the outside and no light will emanate from these faux

windows. It is not possible to light these windows from the inside. As she stated, “As far as activity goes, it will still look like a black window. . . . You won't see any active movement or anything from it.” Tr. 9/3/19, 174. On cross-examination, Ms. Bach admitted, “I think you would have an impression of it being animated for the first 20, 22 feet are building [*i.e.*, the first and second floors], and then above that, I mean it would be dark beyond whatever the . . . [illumination] of the signing from below is illuminating up.” Tr. 9/3/19, 176-177.

Patrick Phillips, an expert in real estate economics and urban planning and development, testified, *inter alia*, regarding whether or not the proposed development should really be classified as a mixed-use project. He agreed that “that is certainly a stated objective of the sector plan, and I think relevant in terms of approval of the conditional use as a result.” Tr. 8/20/19, 284. He defined a “mixed-use” project as one that “includes, three or more revenue producing uses, significant functional and physical integration and conformance to a coherent plan.” Tr. 8/20/19, 286-287. According to Mr. Phillips, that definition was proposed by the Urban Land Institute (ULI) in 1976.

Mr. Phillips opined that “This project in fact meets that standard, which I think is about the strictest definition of mixed-use that I've seen. In practical terms today, what people often refer to as mixed-use involves a commercial building with retail below.” Tr. 8/20/19, 287. Mr. Phillips disagrees with Technical Staff's approach of focusing primarily on the proposed conditional use (Tr. 8/20/19, 287-288):

And when you look at the value of the other uses relative to the sector plan objectives, that's where I think that the -- really the staff report does -- really does not serve the town well or the county well.

This fatal flaw of the staff analysis in my view, is to not consider this project as a fully integrated whole as a mixed-use project.

When pressed by the Hearing Examiner as to what percentage of the building would have to be devoted to non-storage usage to make this a mixed-use project in the sense meant by the

Kensington Sector Plan, Mr. Phillips replied that “this is in the eye of the beholder. And it’s all about perception and design,” though he conceded that “the number of square feet in this particular project devoted to this, the non-storage uses is a relatively small percentage.” Tr. 8/20/19, 288-289. Nevertheless, Mr. Phillips felt that the fact that the 10% of the building not devoted to storage was located at the street and second levels brought those uses into “the immediate zone of perception of the pedestrians, of the motorists, of the people who are experiencing this building.”

The question of what is a “mixed use” was also the subject of Mr. Phillips’ testimony on the last day of the hearing. There he testified (Tr. 9/3/19, 204-206):

But in practice, what’s called mixed use these days is most often an office building, or a residential building with retail or restaurants, or some combination at the ground level. So the parlance has evolved over the last 40 years to include projects like the ones described in the sector plan as well as, in my view, this particular project that the Applicant has proposed.

So I think the discussion around the definition is somewhat beside the point. But I would strongly make the argument that proposed project, which consists of three revenue producing uses that are physically and economically integrated in a coherent plan actually is a mixed-use project.

Mr. Phillips also opined that alternative uses at this location would not be viable, to which the Hearing Examiner responded (Tr. 8/20/19, 289-291),

But you're asking [me to] address alternatives and whether they would be viable, and I don't think that's my function.

My function is to look at this plan and this proposal and say whether it comports with the zoning ordinance.

No party disagreed with the Hearing Examiner’s stated approach.

Mr. Phillips’ final point is that “the way the development economics of the project work, I believe . . . optimizes the public benefits of the project and advances the sector plan objectives.”

Tr. 8/20/19, 292. He described the proposed project as (Tr. 8/20/19, 292-293):

The creation of a high quality urban public space that enhances the connectivity of this site to its surroundings; a retail presence at the ground floor and an artist and maker studio on the second floor.

And all of those things, the way I read the sector plan are highly consistent with it. Staff report expressed some concern about the viability of the ground floor and second floor uses if the upstairs were self-storage instead of housing or office.

They also suggested that the lack of housing or office in the upper floors would impact the pedestrian intensity on the street. And I just wanted to note that I disagree with that. I think that it's clear that the restaurant will require a far larger customer base than the people who might live or work upstairs.

Mr. Phillips felt that a restaurant would not benefit much more from having residences above it than from having storage above. Tr. 8/20/19, 293-294. On cross-examination, Mr. Phillips conceded that a six-story residential building on this property would generate more street front activity than this proposed use would, but he felt that the difference would be marginal. Tr. 8/20/19, 301.

2. The Argument by Technical Staff, the Planning Board and the Town of Kensington that the Proposed Use is Not Consistent with the Sector Plan

The Technical Staff, the Planning Board and the Town of Kensington all found that the proposed use is not consistent with the 2012 Kensington Sector Plan.

a. Technical Staff:

The Technical Staff's analysis regarding the Sector Plan (Exhibit 59, pp. 7-9) is quoted below:

Master Plan

The Property is within the 2012 *Kensington Sector Plan* ("Sector Plan" or "Plan" area). The Sector Plan identifies the Property as "TC-5 Higgins property" within the Plan's Town Center district (pg 21). The proposed self-storage facility at the prominent intersection of Connecticut Avenue and Plyers Mill Road is inconsistent with the Sector Plan's overall vision:

To promote a mixed-use Town Center with pedestrian-friendly connections to the vibrant neighborhoods that define Kensington. Kensington's Town Center will be a lively and active place with streets that are welcoming and comfortable for residents, workers, and visitors (pg 1).

As a passive use that generates very little foot traffic and vitality, the proposed self-storage facility does not fulfill the Plan's overall vision for the Kensington Town Center. The proposed self-storage facility at this location will perpetuate the area's existing industrial, car-centric character. The Sector Plan notes that the commercial

center in Kensington is currently “in conflict with the more intimate character of the historic neighborhoods” (page 4) and the proposed use will perpetuate the existing pattern of industrial development. The proposed restaurant and artist studio spaces show an effort by the Applicant to provide activating uses along Connecticut Avenue and Plyers Mill Road, but those uses are not sufficient to overcome the deadening impact of 126,955 square feet of self-storage.

The Sector Plan’s broad goal is to reinvigorate the Town Center while preserving Kensington’s scale and historic character by:

- *Acknowledging the “commuter” status of Connecticut Avenue while creating new pathways for townspeople to move car free throughout the Town...*
- *Redefining public spaces for people and creating activity along sidewalks ...*
- *Defining new public spaces that will exemplify the unique scale and character of Kensington.*
- *Promoting sustainable infill and reuse ...*
- *Implementing effective environmental practices ...*
- *Transforming Kensington’s exclusively commercial business district into an active Town Center with new residential uses.*
- *Promoting Kensington’s heritage through its building, spaces, and people.*(pg 1)

Although the ancillary uses proposed in association with the self-storage facility support some of the Plan’s goals, the nature of the self-storage use is inconsistent with the primary recommendations of the Sector Plan. The proposed use itself will not create a critical mass of activity along the sidewalks. In contrast, the self-storage facility will likely have a deadening effect on the streetscape because it generates a low amount of traffic that is rarely, if ever, pedestrian. As such, the proposed use will not contribute to an active Town Center. Without a critical mass of pedestrian traffic along the sidewalks, the proposed public open space at the corner of Connecticut Avenue and Plyers Mill Road is unlikely to be a successful gathering place for Kensington residents. In addition, the proposed use does not address the Plan’s goal for introducing new residential uses into the Town Center, nor does it promote the historic character of Kensington.

The Sector Plan includes the following recommendation for the Subject Property:

The approximately one-acre Huggins property may also support mixed-use development. Any development should include street-level shops on Connecticut Avenue and Plyers Mill Road. Parking facilities for this property should be to the rear, with access from Plyers Mill Road. Joint development of this property and the adjoining properties to the east, for a single, mixed-use development, would be desirable (pg 27).

If developed with the proposed ancillary uses, the building would technically be mixed-use. However, the primary component of most mixed-use developments is either office or residential, both of which typically generate patronage and foot traffic that supports and enlivens ground floor retail/restaurant uses. In contrast, the proposed self-storage facility will generate a negligible amount (if any) potential customers to patronize the proposed retail/restaurant uses.

Town Center District and Property Recommendations

- *The Town Center is envisioned as walkable attractive place with local convenience retail, housing, dining, entertainment, offices and neighborhood services in a compact development pattern with a variety of buildings along Connecticut Avenue.” (pg 21)*
- *Provide sidewalk improvements [along Connecticut Avenue] to separate pedestrian from automobile traffic with trees and other buffers along the curb.” (pg 24)*
- *This designation [as a priority retail street] reflects the Plan’s fundamental goal of enlivening the Town Center by creating a lively, pedestrian-centered atmosphere on Kensington’s shopping streets. Retail and other commercial activities are ... especially desirable on the priority retail streets (pg 42).*
- *New and revitalization projects on priority retail streets must pay particular attention to the street-oriented development guidelines put forth in this Plan and the accompanying design guidelines. (pg 42).*

The Sector Plan designates both frontages of the Subject Property as “priority retail streets” (pg 43) that should enliven the Town Center. However, the predominant proposed use of the Property as a self-storage facility will not enliven the Town Center and it is inconsistent with the types of local, neighborhood-serving uses that would promote a walkable Town Center. As previously discussed, the proposed self-storage facility will perpetuate the existing auto-centric development pattern and will likely attract regional traffic rather than the local, pedestrian oriented uses envisioned by the Sector Plan.

Design

- *Streets should be safe, pedestrian oriented environments that create an animated community life along the sidewalks to encourage high levels of pedestrian activity.*
 - *Orient buildings to the sidewalk with display windows and entrances.*
 - *Encourage pedestrian-level ornamentation, signage, and architectural details.*
 - *Minimize curb cuts to reduce conflicts between pedestrians and vehicles.*
 - *Provide street trees and furniture to improve aesthetics and functionality for pedestrians.*
 - *Provide adequate parking for proposed land uses while using strategies to reduce demand, consolidate supply, and use space efficiently. Minimize the visual impact of parking facilities...(pg. 10)*

Some elements of the proposed self-storage facility are consistent with the Sector Plan's specific design goals, including minimizing curb cuts, orienting the building to the sidewalk, and providing adequate parking. However, self-storage facility users typically arrive by car, and a facility of this size at this prominent location will create the antithesis of the animated sidewalk community life envisioned in the Plan. Further, the proposed self-storage facility will bring truck traffic to a heavily used intersection with irregular traffic control at the intersection of Metropolitan Avenue and Plyers Mill Road, potentially introducing additional conflicts with pedestrians in the vicinity.

For the reasons enumerated above, the proposed use is inconsistent with the overall vision and recommendations of the *Kensington Sector Plan*.

b. The Planning Board:

The Planning Board met on July 25, 2019, to consider the subject application at a public session. After hearing a presentation by Technical Staff, and statements by the Applicant, the Town of Kensington and members of the community, the Board voted 3 to 2 to recommend denial of the application. The recommendation of the Planning Board is best summarized in two paragraphs of the Board's letter of July 31, 2019, to the Hearing Examiner (Exhibit 64(a), p. 3):

Planning Board Commissioners had divergent opinions about the Application. Commissioners Dreyfuss and Fani-Gonzalez supported the Application based on the attractiveness of the proposed building and streetscape, and the activation of the first floor provided by the ancillary uses. Commissioner Dreyfuss argued this use is the best use he can envision given the site constraints.

Chair Anderson, and Commissioners Cichy and Patterson determined that the predominance of the self-storage component of the project is not consistent with the Sector Plan, which did not contemplate self-storage on this Property. Further, the long-term profitability of the self-storage use would preclude another use at this location that is entirely consistent with the Sector Plan. . . .

c. The Town of Kensington:

The Town of Kensington sent a letter to Planning Board dated July 10, 2019, attaching the Town's Resolution R-12-2109 and stating the basis for the Town's opposition. A portion of that letter (Attachment 4 to Exhibit 59) is reproduced below:

This letter *is* sent on behalf of the Town of Kensington. The Mayor and Town Council voted on June 19, 2019 to oppose the above referenced Conditional

Use Application. A copy of the Town's Resolution is attached. Our intent in this letter is to provide more context on the basis for the Town's decision.

The Town is careful to review all development project proposed within its boundaries. The Town was an integral part of the development and adoption of the Kensington Sector Plan, and seeks to ensure that its' vision is reflected in each such project. When doing so, the Town, through recommendations from the its' Development Review Board ("DRB") and eventually review by the Mayor and Town Council, works with developers to help shape a project that is responsive to the needs of the developer and to the Sector Plan vision and goals and specific recommendations for the parcels in the Sector Plan area.

Upon receipt of Application CU 19-03, the Town followed the same procedure. This application involves the construction of a self-storage building at the intersection of Connecticut Avenue and Plyers Mill Road ("Project"), which is in the Town Center area and referenced as Analysis Area TC-5, Huggins Property. The other businesses/entities located at this intersection are two gas stations and a fire station.

The overall vision for the Town Center is:

Kensington's Town Center will be a lively and active place with streets that are welcoming and comfortable for residents, workers, and visitors. It will be reachable by walking and bicycle from Kensington's neighborhoods, which can reduce vehicle miles travelled, conserve energy, and reduce carbon emissions. The Town Center will also broaden housing choices for an array of ages and incomes.

Further, in the districts and properties section of the Sector plan:

(T)he Town Center is envisioned as a walkable attractive place with local convenience retail, housing, dining and entertainment, offices, and neighborhood services in a compact development pattern with a variety of buildings along Connecticut Avenue. Properties with the potential to support mixed-use developments with parking structures could have five-to-six-story buildings, while most other properties that do not mix uses would have street activating retail and services in one- or two-story buildings with surface parking. Buildings along Town Center streets should be set back 15 to 25 feet from the curb to provide adequate space/or sidewalks separated from traffic by a green panel or trees. This Plan encourages the retention of existing businesses.

The goals and visions of the Kensington Sector plan are to be reached by adhering to the following:

Connectivity •Acknowledging the "commuter" status of Connecticut Avenue while creating new pathways for townspeople to move car free throughout the Town, enjoying a healthier, more sustainable community.

Design • Redefining public spaces for people and creating activity along sidewalks through smart design of buildings and the spaces around them.

•Defining new public spaces that will exemplify the unique scale and character of Kensington.

Environment •Promoting sustainable infill and reuse, with a goal of creating a neighborhood with the lowest feasible carbon footprint. •Implementing effective environmental practices that will inspire current residents and future generations to become stewards of the environment.

Diversity • Transforming Kensington's exclusively commercial business district into an active Town Center with new residential uses. •Promoting the community's heritage through its buildings, spaces, and people.

With respect to the TC-5, the Huggins Property, the Sector Plan specifically states:

The approximately one-acre Huggins property, currently zoned C-2, may also support mixed-use development. Any development should include street-level shops on Connecticut Avenue and Plyers Mill Road. Parking facilities for this property should be to the rear, with access from Plyers Mill Road. Joint development of this property and the adjoining properties to the east, for a single, mixed-use development would be desirable. p. 27, Sector Plan.

In addition, Connecticut Avenue and Plyers Mill Road, the intersecting streets around the Property, are priority retail streets under the Sector Plan. "This designation reflects the Plan's fundamental goal of enlivening the Town Center by creating a lively, pedestrian-centered atmosphere on Kensington's shopping streets", p. 42, Sector Plan. "Retail and other commercial activities are appropriate and strongly encouraged throughout the Town Center, but they are especially desirable on these priority retail streets", p. 42

Part of the intent of the Sector Plan for this intersection, and for this property, is to activate the area and streetscape. The Project is the first re-development at this intersection) and as such sets the tone with respect to whether the Sector Plan vision will be followed or not. This Project does not fulfill that vision.

The Project as originally proposed would be just more of the same. It would not generate foot traffic and would draw very few people to this area. Numerous public meetings were held between the Applicant, Capital Holdings, LLC, and the DRB, and also with the Mayor and Town Council. Town representatives were also present at the required Community Meeting organized by the Applicant for the public.

A number of recommendations were made to the developer by the DRB as compromise solutions. These included:

- Underground parking
- Entire first floor to be retail, a restaurant preferred
- Entire second floor to be artist studios
- Remaining floors for self-storage

Some of these recommendations were partially included in updated plans, but these plans still do not meet the vision of the Sector Plan for this property and do not meet the requirements for approving a conditional use.

* * *

As noted, the Project does not fulfill the requirements for a conditional use. It is not compliant with the Sector Plan, which is the applicable master plan. Further, this is the first project to be built adjacent to this prominent intersection of priority retail streets that is woefully underdeveloped, on a property that is underutilized but prime for redevelopment. The opportunity exists for a Project that embodies the vision and goals of the Sector Plan and sets the standard for subsequent redevelopment. Instead, the Town is presented with a project that contains a minimal amount of retail space and a majority amount of storage space with a minimal number of employees. This will have an outsize impact on the remainder of the intersection, as it lowers the bar for future development at the other corners. It harkens back to the "old" Kensington, albeit with newer architecture, and not the new vision. This creates an inherent and non-inherent adverse effect. The business itself does not conform to the Sector Plan vision, and in addition makes it far less likely that other projects that do conform to the vision will redevelop at that intersection.

For these reasons, and others that we will discuss at the Planning Board Hearing, at which Town representatives intend to appear, the Town and its residents oppose the conditional use application filed for this property.

Mayor Furman and two member of the Town of Kensington Council (Conor Crimmins and Darin Bartram) testified at the OZAH hearing in opposition to the proposed conditional use.

i. Mayor Tracey Furman:

Mayor Furman testified that the Town of Kensington actively participated in the creation and adoption of the 2012 Kensington Sector Plan, working closely with the County's Planning Department and with the County Council's staff. Exhibit 108, and Tr. 9/3/19, 35-36 and 45-46. Mayor Furman believes that the Town's preference when the Sector Plan was adopted was for the subject site (a/k/a as TC-5, or "the Huggins property") to have residential development with mixed use commercial on the bottom, but that was not in any specific resolution. Tr. 9/3/19, 46-47. She indicated that the Town's Development Review Board (DRB) was created to evaluate projects within the Town and work with the County's Planning Department Technical Staff to see if the project would "fit in within our sector plan." Tr. 9/3/19, 48-49.

Mayor Furman further testified that the Town of Kensington does not believe that the application substantially conforms to the recommendations of the Kensington Sector Plan. She

explained that “we don't feel that it's going to create the vibrancy and the neighborhood feel that we are wanting in that location. . . . I think that particular use will create a dead zone. Particularly, while they are suggesting a restaurant and the artist studios on the second floor, the balance of the building will sit there just a dark hole, and will not create the people, whether it's in an office building or if it's in an apartment, that will help bring that vibrancy to that corner.” Tr. 9/3/19, 56. She also noted that people would tend to drive to the facility, rather than walk, creating more traffic. Mayor Furman completed her testimony by stating her opinion that while the restaurant and art gallery standing alone would conform with the recommendations of the Sector Plan, the storage facility use at this location would not. Tr. 9/3/19, 99-100.

ii. Kensington Councilmember Conor Crimmins:

Conor Crimmins testified that he is a member of the Town of Kensington's Council and also sits on the Development Review Board (DRB). He has been on the DRB during the entire life of the subject application. Mr. Crimmins described the DRB (Tr. 9/3/19, 102-104):

The development review board is a standing committee of the Town. It was established through resolution, and subsequently, the structure of it has been updated through further resolutions of the mayor in the town council. Currently, in its stated format, the DRB has seven members of which two are councilmembers, elected councilmembers. Two are residents of the town. Two are from the professional category, meaning they are either architects, engineers developers, land use attorneys, somebody in the professional field. And the last is a member from Kensington's business community. . . . The development review board, you know, its purpose is to review projects as they are presented to the town. Through the resolution as is stated, the purpose is to look specifically at conformance to the sector plan, to the CRT, and CRN zones. To conformance to the design guidelines and then as to act as an advisory committee to the town council and to the mayor. So we don't take any official action other than advising the council. Our role is to work with Applicants, review projects, and ask questions of them.

After reviewing the history of the subject application's consideration by the DRB, Mr. Crimmins testified that, in “the opinion of the DRB . . . this project does not conform to the sector plan specifically as to its parking . . .,” based on language on page 21 of the Sector Plan (Exhibit

107). He explained that “as a part of the sector plan it was specifically called out that . . . [for] buildings that propose five or six stories that they would also have some sort of structured parking,” which this proposal does not include. “And so the DRB has talked with the Applicant through our review of this process. . . , to conform to the sector plan it was our recommendation that they have a parking structure, preferably underground parking structure.” Tr. 9/3/19, 110-111.

Mr. Crimmins also introduced the Urban Land Institute’s November 2008 “Technical Assistance Panel Report,” entitled “Developing a Revitalization Strategy for the Town of Kensington.” (Hereinafter referred to as the “TAP Report,” Exhibit 113.) He explained that the Town of Kensington had engaged the Urban Land Institute (ULI) in 2008 to assist in updating the previous 1978 Kensington Sector Plan. ULI team members came out to the Town of Kensington, met with members of the Town’s revitalization committee, the town council, the mayor, the local business community and residents, and did site visits. As a result, the ULI published this 2008 TAP Report that helped to coalesce all of the dialogue and information to advise the town as it went forward in modifying the sector plan. It was one of the contributing reports that helped to advise the development of the 2012 approved Kensington Sector Plan. Tr. 9/3/19, 113-114.

Mr. Crimmins stated that the TAP Report also addressed the concept of mixed-use developments. He noted the ULI’s observation that the town had no mixed-use zones, and no methodology or process in place to approve mixed-use developments. He paraphrased page 10 of the TAP Report, indicating “what . . . [the ULI] would like to see is that buildings combine ground level retail with office space and/or residential units to create mixed use.” Tr. 9/3/19, 114-115. This definition of mixed use was repeated at page 15 of the TAP Report – “Mixed-Use Zones with ground floor retail—office and/or residential above.”

Mr. Crimmins testified that the references in the 2012 Kensington Sector Plan to “mixed-

use” development had this definition of mixed use in mind, as reflected on pages 10 and 15 of the TAP Report. “The definition in the ULI report is the definition that we were working off of as a DRB, as it related to the sector plan.” Tr. 9/3/19, 115-116. The Town’s attorney argued that “this informs how the sector plan recommendation for mixed-use should be read and applied,” not Mr. Phillip’s broader definition. Tr. 9/3/19, 116-118. In contrast, the Applicant’s attorney argued that the reference to “mixed-use” in the TAP Report concerned the need for a mixed-use zone, not a definition of the term “mixed-use.” Tr. 9/3/19, 123.

On cross-examination, Mr. Crimmins admitted that the Sector Plan calls for structured parking for 5 to 6 story buildings, but does not specify that it must be underground parking. He also agreed that on page 27 of the Sector Plan, where it talks about the Huggins property specifically, it says, “parking facilities for this property should be to the rear with access from Plyers Mill Road,” but does not mention “structured parking.”⁸ Tr. 9/3/19, 120-121.

On redirect, Mr. Crimmins testified that “that is the definition that I specifically, and, you know, the DRB has been working off of it is the mixed use, especially in the town center is ground-floor retail with either commercial, residential, or in some cases perhaps even a hotel above.” Tr. 9/3/19, 124.

iii. Kensington Councilmember Darin Bartram:

The final witness called by the Town of Kensington was Darin Bartram, a member of the Town Council and its Development Review Board. Although elected to the Council in 2013, Mr. Bartram testified that he served on the Town’s Revitalization Committee “since around 2010, 2011

⁸ Zoning Ordinance §59.3.5.9.B. defines “Structured Parking” as “a one or more level free-standing structure for parking or storing motor vehicles that does not share a common floor or ceiling with another use allowed in the zone. Structured Parking does not include Surface Parking.” Section 59.3.5.9.C.1. defines “Surface Parking for Use Allowed in the Zone” as “surface parking in connection with any permitted or limited use allowed in the zone where no building or other use requiring parking is on the same lot.”

timeframe. And so that was when the sector plan was being developed, a draft was being produced and we, as the town were commenting on it. So I was both involved as a resident and as a revitalization committee member.” Tr. 9/3/19, 128-129.

Mr. Bartram stated that he was “very involved” with the process of drafting the 2012 Kensington Sector Plan, and has a “deep familiarity with the sector plan and its recommendations.” Tr. 9/3/19, 128-130. He agreed with Mr. Crimmins’ characterization of the definition of “mixed-use” as it is stated in the ULI report, and he further testified (Tr. 9/3/19, 130):

And so trying to bring people downtown was the central goal to what we were looking to do for Kensington. We saw restaurant after restaurant open and go under because our downtown could go dead at night. We had antique stores that would close at 5:00. We had the only thing that seemed to stay open in downtown Kensington were gas stations. And so we were looking to bring more people downtown, have a greater variety of residents who would support businesses and help them thrive.

Mr. Bartram opined that while the proposed use of a restaurant on part of the first floor and a proposed use of artist studio on part of the second floor have an ability to animate somewhat, the proposed storage facility would not “have any ability to animate the town whatsoever.” Tr. 9/3/19, 131. In answer to a question from the Hearing Examiner, Mr. Bartram indicated that the positive impact of the restaurant and artist studios would not be sufficient to overcome the rest of the building being storage. Tr. 9/3/19, 136.

In response to a question as to whether the easement for access across the adjoining property would constitute an adverse non-inherent characteristic of the development, Mr. Bartram further testified that “The result of an easement into that adjacent property is that you would have a lot of cross traffic from the proposed storage facility . . . into the existing parking lot next door before it exits onto Metropolitan [Avenue]. For that easement to exist and be far enough away from the intersection, I believe would significantly impact the ability of that adjacent property to redevelop.” Tr. 9/3/19, 131-132. There followed a lengthy discussion among counsel and the Hearing Examiner

as to the relevance of the potential effects of an access easement on the abutting land owner who granted the easement, and on any successors in interest. Tr. 9/3/19, 131-147.⁹

In the remainder of his testimony, Mr. Bartram mostly discussed potential access, parking and circulation difficulties with the Applicant's proposals for the site. Tr. 9/3/19, 147-165. He ultimately concluded that having a large building with six of the eight levels being "dead" would be "a terrible thing for the community." Tr. 9/3/19, 162. On re-cross, Mr. Bartram stated (Tr. 9/3/19, 164):

I believe self-storage does not contribute to the revitalization. It doesn't contribute to the vibrancy of town. It is dead space. And it's a dead space that conveys itself through the signage, through the blacked out windows, through the lack of activity going to and from the site.

3. The Hearing Examiner's Conclusion that the Proposed Use is Not Consistent with the Sector Plan

The Applicant quite accurately states in its "Closing Statement" (Exhibit 121, p. 5) that "a pivotal question in this case is whether the Application conforms to the Sector Plan." In fact, the Hearing Examiner finds that it is the pivotal question in this matter, since the outcome of the case revolves around it. As stated earlier in this discussion, in order to approve a conditional use application, Zoning Ordinance §59.7.3.1.E.1.c. requires, *inter alia*, a finding by the Hearing Examiner that the proposed use "*substantially conforms with the recommendations of the applicable master plan.*"

The "applicable master plan" is the 2012 Kensington Sector Plan (Exhibit 107). The "Vision" of the Sector Plan is stated on its very first page:

⁹ The Hearing Examiner is not convinced that the protections afforded to abutting land owners by the Zoning Ordinance were intended to cover self-inflicted wounds of an easement granted by the abutting owner. Nevertheless, as discussed later in this Report and Decision, the adverse impacts on the general neighborhood of this proposed development are relevant to this inquiry.

Vision

To promote a mixed-use Town Center with pedestrian-friendly connections to the vibrant neighborhoods that define Kensington.

Kensington's Town Center will be a lively and active place with streets that are welcoming and comfortable for residents, workers, and visitors. It will be reachable by walking and bicycle from Kensington's neighborhoods, which can reduce vehicle miles travelled, conserve energy, and reduce carbon emissions. The Town Center will also broaden housing choices for an array of ages and incomes.

The Plan protects Kensington's stable residential neighborhoods by maintaining their residential zones and preserves the Town's historic character by recommending additional areas and sites to be evaluated for addition to the Master Plan for Historic Preservation.

The Plan's broad goal is to reinvigorate the Town Center while preserving Kensington's scale and historic character.

The plan for the "Town Center" is expanded on page 21 of the Sector Plan, a portion of which is reproduced below:

The Town Center is envisioned as a walkable attractive place with local convenience retail, housing, dining and entertainment, offices, and neighborhood services in a compact development pattern with a variety of buildings along Connecticut Avenue. Properties with the potential to support mixed-use developments with parking structures could have five- to six-story buildings, while most other properties that do not mix uses would have street activating retail and services in one- or two-story buildings with surface parking. Buildings along Town Center streets should be set back 15 to 25 feet from the curb to provide adequate space for sidewalks separated from traffic by a green panel or trees. This Plan encourages the retention of existing businesses.

The Sector Plan, at page 27, also addresses the specific property in question, known as "TC-5 Huggins property:"

TC-5 Huggins property

The approximately one-acre Huggins property, currently zoned C-2, may also support mixed-use development. Any development should include street-level shops on Connecticut Avenue and Plyers Mill Road. Parking facilities for this property should be to the rear, with access from Plyers Mill Road. Joint development of this property and the adjoining properties to the east, for a single, mixed-use development, would be desirable. This property is recommended for CRT 2.5: C 2.0, R 2.0, H 75.

Not surprisingly, divergent views have been presented in this case on how to interpret the Sector Plan. However, it is indisputable that the Sector Plan (Exhibit 107, pp. 1 and 21) calls for:

- A mixed-use Town Center with pedestrian-friendly connections to the vibrant neighborhoods that define Kensington;
- A Town Center that will be a lively and active place with streets that are welcoming and comfortable for residents, workers, and visitors;
- A Town Center that will broaden housing choices for an array of ages and incomes;
- A broad goal to reinvigorate the Town Center; and
- A Town Center that is a walkable attractive place with local convenience retail, housing, dining and entertainment, offices, and neighborhood services in a compact development pattern with a variety of buildings along Connecticut Avenue.

It is also indisputable that the Sector Plan calls for “mixed-use development” on the subject property, and notes that any such development “should include street-level shops on Connecticut Avenue and Plyers Mill Road. Parking facilities for this property should be to the rear, with access from Plyers Mill Road.” Exhibit 107, p. 27.

A portion of the Applicant’s project includes a street-level restaurant and second floor artists’ studios, as well as other amenities for pedestrians and bicyclists, all of which will obviously create some positive direction towards meeting Sector Plan goals. Thus, the decision in this case comes down to the central question of how much “good stuff” is enough to constitute substantial compliance with the Sector Plan and whether the addition of the large and dark self-storage portion of the building would so undermine the positive effects of the restaurant and artists’ studios as to, on balance, constitute a development that is inconsistent with the goals of the Sector Plan.

The evidence in this case establishes, incontrovertibly, that only 10 percent of the building will be devoted to non-storage uses (*i.e.*, the restaurant and artists’ studios), and 90 percent will be devoted to the proposed self-storage use. The Applicant and its supporters contend that this mix is sufficient to substantially comply with the Sector Plan (See discussion in Parts II. D.1. and II.E.1.

of this Report and Decision), and the Planning Board, Technical Staff, the Town of Kensington and the community opposition contend that it is insufficient (See discussion in Parts II. D.2. and II.E.2. of this Report and Decision).

The Hearing Examiner must determine, based on the record, whether or not the proposal before him sufficiently serves the goals of the Sector Plan, as evidenced by the intent of its framers. It may be, as some of the evidence has suggested, that rejecting this project will not necessarily result in a better project for the site (*i.e.*, one that would include residential units or would at least be more likely to enliven the area than this proposal). However, it is not the Hearing Examiner's job to decide that question. As the Hearing Examiner stated a number of times during the hearing, the question before him is not whether there might or might not be better alternatives to the Applicant's plans, but rather whether this particular proposal (*i.e.*, the only one before him) meets the criteria specified in the Zoning Ordinance.

Based on his review of the record in this case, the Hearing Examiner finds and concludes that the Applicant has not demonstrated, by a preponderance of the evidence, that its proposal substantially conforms with the objectives of the 2012 Kensington Sector Plan, outlined above.

The key here is that a large building, 90% of which is devoted to self-storage, and which is dark at night above the second floor, is not what the framers of the Sector Plan intended for the Town Center of Kensington. Those framers – the Planning Board, the Planning Department's Technical Staff and the Town of Kensington – have spoken clearly here, as set forth in Part II.E.2. of this Report and Decision. It is not only that the case law requires some deference to an agency's interpretation of the regulations that govern it, it is that the agencies in question here actually framed and adopted the very regulation in question—the 2012 Kensington Sector Plan. Thus, their opinion

as to what is required for substantial compliance with the Sector Plan is the best evidence of the intent of that Plan.

Technical Staff summed up their position well in the following portion of its analysis of the Sector Plan (Exhibit 59, pp. 7-8):

As a passive use that generates very little foot traffic and vitality, the proposed self-storage facility does not fulfill the Plan's overall vision for the Kensington Town Center. The proposed self-storage facility at this location will perpetuate the area's existing industrial, car-centric character. The Sector Plan notes that the commercial center in Kensington is currently "in conflict with the more intimate character of the historic neighborhoods" (page 4) and the proposed use will perpetuate the existing pattern of industrial development. The proposed restaurant and artist studio spaces show an effort by the Applicant to provide activating uses along Connecticut Avenue and Plyers Mill Road, but those uses are not sufficient to overcome the deadening impact of 126,955 square feet of self-storage.

* * *

Although the ancillary uses proposed in association with the self-storage facility support some of the Plan's goals, the nature of the self-storage use is inconsistent with the primary recommendations of the Sector Plan. The proposed use itself will not create a critical mass of activity along the sidewalks. In contrast, the self-storage facility will likely have a deadening effect on the streetscape because it generates a low amount of traffic that is rarely, if ever, pedestrian. As such, the proposed use will not contribute to an active Town Center. Without a critical mass of pedestrian traffic along the sidewalks, the proposed public open space at the corner of Connecticut Avenue and Plyers Mill Road is unlikely to be a successful gathering place for Kensington residents. In addition, the proposed use does not address the Plan's goal for introducing new residential uses into the Town Center, nor does it promote the historic character of Kensington.

The Planning Board's majority echoed Staff's findings (Exhibit 64(a), p. 3):¹⁰

Chair Anderson, and Commissioners Cichy and Patterson determined that the predominance of the self-storage component of the project is not consistent with the Sector Plan, which did not contemplate self-storage on this Property. Further, the long-term profitability of the self-storage use would preclude another use at this location that is entirely consistent with the Sector Plan. . . .

¹⁰ The fact that Commissioner Dreyfuss, in the minority on the Board, argued that "this use is the best use he can envision given the site constraints" is not instructive in this proceeding because, as stated above, the Hearing Examiner's role is not to determine the "best use" on the site, but whether the proposed use is one which substantially conforms with the goals of the Sector Plan.

Moreover, even though the Hearing Examiner has found that that Maryland Code, Land Use Article, Section § 24-201 is not binding on this proceeding (as discussed in Part II. D.3. of this Report and Decision), the rationale for having such a provision does apply here, in that it is the Town of Kensington that will have to live with the results of development decisions in Kensington, so the resolutions of its Mayor and Council, and their stated opinions, should be accorded appropriate consideration.

The position of the Mayor and the Town of Kensington were made clear in the Town of Kensington's July 10, 2019 letter to the Planning Board (Attachment 4 to Exhibit 59) and in the testimony of Mayor Furman and Councilmembers Crimmins and Bartram. As stated in the July 10, 2019 letter, at p. 4,

. . . [T]he Town is presented with a project that contains a minimal amount of retail space and a majority amount of storage space with a minimal number of employees. This will have an outsize impact on the remainder of the intersection, as it lowers the bar for future development at the other corners. . . . The business itself does not conform to the Sector Plan vision, and in addition makes it far less likely that other projects that do conform to the vision will redevelop at that intersection.

Mayor Furman also testified that the application would not substantially conform to the recommendations of the Kensington Sector Plan (Tr. 9/3/19, 56):

We don't feel that it's going to create the vibrancy and the neighborhood feel that we are wanting in that location. . . . I think that particular use will create a dead zone. Particularly, while they are suggesting a restaurant and the artist studios on the second floor, the balance of the building will sit there just a dark hole, and will not create the people, whether it's in an office building or if it's in an apartment, that will help bring that vibrancy to that corner.”

Kensington Councilmember Crimmins testified that the Applicant's proposal did not conform to the concept of “mixed-use” as contemplated in the drafting of the 2012 Sector Plan. Rather, the Sector Plan drafters had in mind the definition of “mixed-use” contained in the ULI's TAP Report (Exhibit 113, pp. 10 & 15). Tr. 9/3/19, 115-116. This definition of mixed use is clearly

stated at page 15 of the TAP Report – “Mixed-Use Zones with ground floor retail—office and/or residential above.” As stated by Mr. Crimmins, “The definition in the ULI report is the definition that we were working off of as a DRB, as it related to the sector plan.” Tr. 9/3/19, 115-116. The Applicant’s plans do not include office or residential uses.

Kensington Councilmember Bartram also testified that the Applicant’s proposal is inconsistent with the Sector plan’s goals (Tr. 9/3/19, 164):

I believe self-storage does not contribute to the revitalization. It doesn't contribute to the vibrancy of town. It is dead space. And it's a dead space that conveys itself through the signage, through the blacked out windows, through the lack of activity going to and from the site.

There were many letters filed both for and against this application, samples of which are quoted in Parts II. D.1. and 2 of this Report and Decision. Three community witnesses testified in support of the application and two community witnesses testified in opposition to the application at the hearing. Their testimony is summarized in Parts II. D.1. and 2 of this Report and Decision. Although this evidence was considered, it will not be repeated here, the interest of brevity.

Arrayed against the evidence from the Planning Board, the Technical Staff and the Town of Kensington is the evidence produced by the Applicant regarding conformity to the Sector Plan.¹¹ As discussed in Part II.E.1. of this Report and Decision, the Applicant addressed the Sector Plan Compliance issue at length in its Second Revised Statement in Support of the Application (Exhibit 99(e), pp. 4-14), contending therein that “The Project substantially conforms to the Sector Plan and Design Guidelines.” In addition, the Applicant called three expert witnesses who directly addressed Master Plan compliance issues – Matthew Clark, a landscape architect; Michelle Bach, an architect;

¹¹ Since the Hearing Examiner has decided that the access and circulation issues can be resolved at Preliminary Plan Review and do not warrant rejection of the application at this stage (Part II.C.2. of this Report and Decision), the discussion below will address only the central issue of conformity to the Sector Plan.

and Patrick Phillips, an expert in real estate economics and urban planning and development.

Mr. Clark testified that, in his opinion, the proposed landscaping would be consistent both with the Kensington Sector Plan and the Kensington Design Guidelines, and would be compatible with the neighborhood. Tr. 8/20/19, 148-163. He stated that the proposal supports a mixed-use development, with street level shops on Connecticut Avenue and parking in the rear.

Applicant's architect, Michelle Bach, testified that in her opinion, the proposed building's orientation, massing, pedestrian scale, the selected materials pallet of industrial windows, brick and stucco, the setbacks, signage, the landscaping and the feel of the building would comply with the Kensington Sector Plan and Design Guidelines and would be architecturally compatible with, and in harmony with, the character of the surrounding neighborhood. Tr. 8/20/19, 203-206.

Ms. Bach also testified that all the windows above the second floor of the building (*i.e.*, on floors 3, 4, 5 and 6) would be "faux" or "spandrel" windows. Tr. 9/3/19, 169-177. That means that no indoor activity will be visible from the outside and no light will emanate from these faux windows. As she stated, "As far as activity goes, it will still look like a black window. . . . You won't see any active movement or anything from it." Tr. 9/3/19, 174.

Patrick Phillips, the Applicant's expert in real estate economics and urban planning and development, testified, *inter alia*, that a "mixed-use" project is one that "includes, three or more revenue producing uses, significant functional and physical integration and conformance to a coherent plan." Tr. 8/20/19, 286-287. According to Mr. Phillips, that definition was proposed by the Urban Land Institute (ULI) in 1976.

Mr. Phillips opined that "This project in fact meets that standard . . ." (Tr. 8/20/19, 287), and that ". . . the discussion around the definition is somewhat beside the point." Tr. 9/3/19, 204.

While Mr. Phillips may "think the discussion around the definition [of mixed-use] is

somewhat beside the point” (Tr. 9/3/19, 204), the Hearing Examiner finds that the definition of “mixed-use,” as intended in the Kensington Sector Plan, is precisely the point.

The Hearing Examiner cannot consider that term in the abstract. While the Hearing Examiner accepts Mr. Phillips testimony that the term “mixed-use” has evolved and that under current understandings of the term, “mixed-use” could include the present proposal combining self-storage with a restaurant and artist studios, even without any office or residential component, that is not really the question the Hearing Examiner must address. The real question posed by Zoning Ordinance §59.7.3.1.E.1.c. is what the creators of the Sector Plan intended the term “mixed-use” to mean in connection with this site. It is apparent from the testimony of the Town of Kensington officials who participated in drafting the Sector Plan and from the TAP Report (Exhibit 113) definition on which they relied, that the intent was for a “mixed-use” at this site to include either office or residential space to enliven the area.

Moreover, even if we accepted Mr. Phillips argument that the term “mixed-use” should be given a broader definition, the Hearing Examiner must determine what level of non-storage use would be adequate to allow a conclusion that the proposed development would sufficiently enliven the area and thus be consistent with the intent of the Sector Plan.

When pressed by the Hearing Examiner as to what percentage of the building would have to be devoted to non-storage usage to make this a mixed-use project in the sense meant by the Kensington Sector Plan, Mr. Phillips replied that “this is in the eye of the beholder. And it’s all about perception and design,” though he conceded that “the number of square feet in this particular project devoted to this, the non-storage uses is a relatively small percentage.” Tr. 8/20/19, 288-289.

Here, the Hearing Examiner credits the evidence from the Town of Kensington, the

Planning Board, the Technical Staff and the opposition community witnesses that, despite some improvements of the public space along the street, having only a 10 percent portion of a large building devoted to non-storage uses, at the heart of the Kensington Town Center, is not sufficient to meet the Sector Plan's "vision" of Town Center development that "will be a lively and active place." Sector Plan, p. 1. While the proposed location of the uses not devoted to storage is helpful, the Hearing Examiner finds that it is not enough to overcome the deadening effect of 90 percent of the use being devoted to self-storage.

The Applicant's planners may have designed the proposed building to improve its impacts on the community and meet some of the Kensington Design Guidelines, but no matter how much lipstick is placed on this project, it still calls for a large building that is almost 90% storage, which is to say, not interactive with the community in the way intended by the Sector Plan. Moreover, all the windows above the second floor will be faux windows and will have no internal lighting at night, so as to create a monolithic façade that will deaden, rather than enliven the neighborhood.

In sum, the Hearing Examiner finds that the proposed use, a building devoting 90% to self-storage and 10% to a restaurant and artists' studio, is not the kind of mixed-use development the drafters of the Kensington Sector Plan had in mind for this site at the Town Center.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a self-storage facility. *Zoning Ordinance* §59.3.6.8.D.2.b. It so happens that the only standard set forth in §59.3.6.8.D.2.b. is a reference back to the general standards of §59.7.3.1.E.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, would satisfy some, but not all, of the requirements for the use. The application must therefore be denied.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:¹²

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Technical Staff advises that there are two previous special exception approvals on the property – CBA-1332, an automobile Sales Lot and S-104, an automobile rental facility. As Staff noted (Exhibit 59, p. 14), if this conditional use were ultimately approved, it would supersede the existing special exceptions, requiring revocation of the prior special exceptions on the site.

Based on this record, the Hearing Examiner finds that this provision would be satisfied by the revocation of pre-existing special exceptions on the site, if the conditional use were granted.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;

Conclusion: This subsection requires an analysis of the standards of the CRT-2.5, C-2.0, R-2.0,

¹² Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

H-75 Commercial Residential Town Zone contained in Article 59-4; the use standards for a self-storage facility contained in Article 59-3; and the applicable development standards contained in Article 59-6, to the extent necessary to ensure compatibility. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively).

Based on the analysis contained in those discussions, the Hearing Examiner finds, as did a majority of the Planning Board (Exhibit 64(a)) and the Technical Staff (Exhibit 59, p. 18 and Exhibit 95), that the proposed self-storage facility is inconsistent with the Kensington Sector Plan and will create non-inherent adverse impacts to the development potential of the neighborhood.

c. substantially conforms with the recommendations of the applicable master plan;

Conclusion: The subject property lies within the geographic area covered by the 2012 Kensington Sector Plan. The question of whether the Applicant's proposal would substantially conform with the recommendations of the Sector Plan is addressed at great length in Part II.E. of this Report and Decision. That discussion is incorporated herein. Based on that analysis, the Hearing Examiner concludes that the proposed conditional use will not substantially conform with the recommendations of the applicable master plan, as required by this provision.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: Technical Staff replies to this provision as follows (Exhibit 59, p. 16):

. . . the Sector Plan envisions an evolution of the Kensington Town Center from an auto-centric commercial-industrial area to a vibrant, mixed-use, pedestrian friendly environment. The proposed self-storage facility will perpetuate the status quo development pattern, which is inconsistent with the vision of the Sector Plan.

As discussed in response to the previous provision, the proposed conditional use will not substantially conform with the recommendations of the applicable Master Plan (*i.e.*, the 2012

Kensington Sector Plan). It will alter the surrounding neighborhood in a manner inconsistent with the Sector Plan because it will not create the kind of vibrant, mixed-use, pedestrian friendly environment envisioned by the Plan, and it will discourage the type of growth sought by the Plan. Thus, the Hearing Examiner finds that the proposed use will not comply with this provision.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Technical Staff indicated that “The Property does not directly abut or confront residential development, but it is located within close proximity to a neighborhood in the R-60 Zone.” Exhibit 59, p. 16. Since the two special exceptions Staff noted on the site (CBA-1332, an automobile sales lot and S-104, an automobile rental facility) would have to be removed if the current application were granted, the number of special exceptions would be thereby reduced. Exhibit 59, p. 14. However, given the nature of the proposed use, it does not conform with the recommendations of the Sector Plan, and thus could “affect the area adversely” if ultimately approved, as described in Part II.E.3. of this Report and Decision.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: Technical Staff reports that “A preliminary plan will be required if the conditional use is approved and the Planning Board will determine if Adequate Public Facilities exist to support the proposed use of the Property as a self-storage facility.” Exhibit 59, p. 17. The Hearing Examiner agrees that under §59.7.3.1.E.1.f.ii., it is the Planning Board, and not the Hearing Examiner, that must determine the adequacy of public facilities. Therefore, the Hearing Examiner will not make a finding as to the adequacy of public facilities in this case.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;

ii. traffic, noise, odors, dust, illumination, or a lack of parking; or

iii. the health, safety, or welfare of neighboring residents, visitors, or employees.

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As

specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a self-storage facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a self-storage facility (Exhibit 59, p. 17):

(1) large buildings; (2) parking areas; (3) lighting for the building and parking areas; (4) vehicular trips to and from the site by employees, customers, and for trash pick-up; and (5) noise associated with the loading and unloading of materials, garbage pick-up, and equipment operations for the facility.

The Hearing Examiner agrees that these characteristics are inherent in a self-storage facility, but “the devil is in the details” because the size of the proposed facility on any given site, in relation to its neighbors, and the impacts on the neighborhood based on site conditions, may be non-inherent characteristics for any particular project. Those issues are discussed below in connection with the facts of this case.

Technical Staff voices its opinion that there would be non-inherent adverse effects from the proposed use on this site (Exhibit 59, pp. 17-18):

A non-inherent characteristic is unique to the physical location, operation, or size of a proposed use. The proposed self-storage facility will create non-inherent adverse impacts to the neighborhood as a result of its location and access points. The location of the proposed self-storage facility at the prominent intersection of Connecticut Avenue and Plyers Mill Road creates a non-inherent adverse impact to the development potential of the abutting and confronting properties considering the overall vision of the Sector Plan. The proposed self-storage facility will continue the existing pattern of car-centric uses, which is inconsistent with the pedestrian and street activating uses envisioned by the Sector Plan. Furthermore, the proposed use will potentially discourage neighboring property owners from redeveloping in a manner consistent with the activating uses envisioned by the Sector Plan. As described in the Transportation section of this report, the proposed access points have the potential to create adverse impacts on traffic and safety in the neighborhood, particularly in conjunction with the trucks associated with the self-storage facility. The proposed access points are generally problematic, particularly for trucks exiting the Property through the adjacent shopping center to make a left turn onto Metropolitan Avenue. The existing curb cut on Metropolitan Avenue is too close to the intersection of Metropolitan Avenue and Plyers Mill Road (MD-192). Existing left turns out of the site are challenging, and trucks attempting to make this movement would obstruct traffic.

Essentially, Staff's argument rests on inconsistency with the vision of the Sector Plan, the potential impacts on future development in the area, and on traffic safety issues, given the locations of proposed site access. Thus, Staff's analysis finds non-inherent adverse impacts of the proposed use in all three of the subcategories listed in Zoning Ordinance §59.7.3.1.g -- development potential of the general neighborhood; traffic issues; and safety issues for neighboring residents, visitors and employees.

The Applicant hotly contests all three of Staff's conclusions. As to the effects on development in the general neighborhood, the Applicant introduced the testimony of Patrick Phillips, an expert in real estate economics and urban planning and development, who opined that the proposed development would create a "high quality urban public space that enhances the connectivity of this site to its surroundings," consistent with the goals of the Sector Plan. Tr. 8/20/19, 292-293. The Applicant's case in this regard is summarized in Part II.E.1. of this Report and Decision. The Response of Technical Staff and the Town of Kensington is summarized in Part

II.E.2. of this Report and Decision.

With regard to traffic and safety issues, the Applicant introduced a Truck Turn Plan (Exhibit 101(a)) and testimony from a traffic engineer, Brian Biddle, that the current plans would produce safe circulation for the proposed use. Tr. 8/20/19, 274 and Tr. 9/3/19, 194-196. Counsel for the Town of Kensington closely questioned Mr. Biddle about whether the Truck Circulation Plan provided sufficient leeway for trucks to safely maneuver through the subject site and onto the adjacent roadways. Tr. 9/3/19, 178-193. The Applicant's engineer, Brad Fox, also testified that all the circulation deficiencies that were noted by Technical Staff can be resolved without any major changes. Tr. 8/20/19, 92. He produced an email from an SHA Regional engineer, stating that the SHA engineer "would be okay with keeping the southernmost access point [on Connecticut Avenue] and closing the one closer to Plyers Mill." Exhibit 89.

Conclusion: Based on the weight of the evidence, especially the findings of the Technical Staff, the Planning Board and the Town of Kensington, the Hearing Examiner finds that that the proposed use will cause undue harm to the development potential of the general neighborhood because it is inconsistent with the recommendations for this site in the Kensington Sector Plan, as discussed in Part II.E.3. of this Report and Decision. The harm to development potential is undue because the proposed use would discourage other development in the area consistent with the goals of the Sector Plan. The Hearing Examiner notes that he is not making this finding based on potential harm to the abutting and confronting neighbors, but rather regarding harm to development in the general neighborhood.¹³

¹³ There was an extended discussion at the hearing, during the testimony of Kensington Councilmember Darin Bartram, about the potential adverse effects of an access easement on the abutting land owner who granted the easement and on possible successors in interest. Tr. 9/3/19, 131-147. The Hearing Examiner is not convinced that the protections afforded to abutting land owners by this provision were intended to cover self-inflicted wounds of an easement granted by the abutting owner. Nevertheless, the adverse impacts on the general neighborhood, which is

However, the Hearing Examiner is persuaded by a preponderance of the evidence that the access and traffic safety issues for drivers and pedestrians raised by Technical Staff would likely be resolved at Preliminary Plan, as pointed out in Part II.C.2. of this Report and Decision. If in fact that turns out not to be the case, then this project will fail at that stage.

Based on the entire record, the Hearing Examiner finds that the proposed use would cause undue harm to the general neighborhood in the first category listed in §59.7.3.1.E.1.g., as a result of non-inherent adverse effects alone, or in combination with inherent adverse effects of the use.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: This provision is not applicable since the site is not in a *Residential Detached zone*.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: As reported above, the application does not satisfy all the specific requirements for the conditional use. The Hearing Examiner concludes that the conditional use must be denied.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the CRT-2.5, C-2.0, R-2.0, H-75 Commercial Residential Town Zone.

Technical Staff notes (Exhibit 59, p. 14), “If the Hearing Examiner approves the proposed conditional use and the Project moves forward, it will be an optional method development under Section 4.5.3.A.2 because the proposed density is greater than 1.0 FAR and 10,000 square feet.”

also protected by this section, were amply demonstrated by the evidence in this case provided by Technical Staff, the Planning Board, the Town of Kensington and numerous opposition witnesses and letters.

Optional Method Development standards for the CRT Zone are contained in §59.4.5.4. of the Zoning Ordinance and in the specifications of the zone, itself. The specifications of the zone in question, the CRT-2.5, C-2.0, R-2.0, H-75 Zone, provide for a maximum density of 2.5 FAR (floor area ratio) and a height limit of 75 feet. The permitted density is further specified by the Zone as a 2.0 Maximum FAR for Commercial development and a 2.0 Maximum FAR for Residential development. Staff provided the following Table showing compliance with the Zone's standards, subject to review at Preliminary Plan and Sketch Plan (Exhibit 59, p. 14):

Table 1: CRT Optional Method Development Standards -Section 59-4.5.4.B		
	Required/Allowed	Proposed
Tract	n/a	46,893 sf
Prior dedication	n/a	810 sf
Site	n/a	46,083 sf
Open Space (min)	5% (2,304 SF)	22% (10,200 SF)*
Density (max)	2.5 FAR	Up to 2.0 FAR (93,786)**
Commercial	2.0 FAR	Up to 2.0 FAR (93,786)**
Residential	2.0 FAR	n/a
Height	75 ft	75 ft
Setbacks (min)		
Front	Established by site plan	21.3 ft
Rear	Established by site plan	7.1 ft
Side (southwest)	Established by site plan	60.4 ft
Side (northeast)	Established by site plan	17.5 ft
Form Standards	Established by site plan	

* The Conditional Use Plan does not clearly indicate if this entire area can be considered the "Public Open Space" required in the CRT zone as defined in Section 59-6.3.6.A.2.

** 49,770 sf of the proposed building is located in a cellar which does not count as gross floor area (GFA) per Section 59-1.4.2 (definition of "Gross Floor Area").

Under Zoning Ordinance §59.4.5.4.A.1., the Planning Board must approve a "Sketch Plan" for the site, in accordance with Zoning Ordinance §59.7.3.3, if a conditional use is approved.

Technical Staff indicated the portion of the proposed building to be devoted to each specified use (Exhibit 59, p. 14):

The proposed building is a total of 141,433 square feet with:

- 126,955 sf of self-storage (including 49,770 sf of cellar space that does not count towards the maximum density)
- 8,141 sf of Artisan Manufacturing and Production
- 6,337 sf of Restaurant

Based on this breakdown of the space used in the building, the Hearing Examiner calculates that only 10.2% of the building would be occupied by the proposed restaurant and artist studios $((8,141 + 6337) / 141,433 = 10.2\%)$, and the remainder (89.8%) by the self-storage use.

Technical Staff also discussed the “Public Benefits” points required in the zone for this proposed use (Exhibit 59, pp. 14-15):

Public Benefits

Under Section 59-4.5.4.A.2.a a property in the CRT zone with a tract size greater than 10,000 square feet, or a maximum FAR mapped above 1.5, must provide 50 public benefit points in three categories. The Applicant’s Statement of Justification explains that public benefit points will be requested for streetscape improvements along Connecticut Avenue and Plyers Mill Road, small business opportunities, public open space and exceptional design. If the conditional use is approved, all public benefit categories must be approved by the Planning Board during the Sketch Plan.

Conclusion: As can be seen from the above discussion and Table, the proposed use appears to meet all the development standards of the CRT Zones, as provided in Zoning Ordinance §59.4.5.4., but the final evaluation will have to await Preliminary Plan and Sketch Plan reviews by the Planning Board. Absent an subsequent contrary finding by the Planning Board, the Hearing Examiner finds that the Applicant’s proposal does conform to the CRT Zone’s Development Standards.

C. Use Standards for a Self-Storage Facility (Section 59.3.6.8.D.2.b.)

The specific use standards for approval of a self-storage facility are set out in Section 59.3.6.8.D.2. of the Zoning Ordinance:

D. Self-Storage

1. Defined

Self-Storage means a structure providing separate storage areas for personal or business use designed to allow private access by the tenant.

2. Use Standards

*

*

*

b. Where Self-Storage is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use.

Conclusion: The Hearing Examiner finds that the proposed use meets the definition of a self-storage facility. The only criterion specified in Zoning Ordinance §59.3.6.8.D.2.b. for approval of a self-storage conditional use is that it may be permitted by the Hearing Examiner under the general conditional use provisions specified in Zoning Ordinance §59.7.3.1. As discussed in Part III.A. of this Report and Decision, the Hearing Examiner finds that the application meets some, but not all, of the findings required by Zoning Ordinance §59.7.3.1. It therefore does not meet the sole standard for approval under Zoning Ordinance §59.3.6.8.D.2.b.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under Section 59.7.3.1.E.1.b. of the Zoning Ordinance, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards

Section 6.1.2. Applicability

Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

- A. an apartment, multi use, or general building type is proposed; and***
- B. a site plan or conditional use approval is required.***

Section 6.1.3. General Access Requirements

A. Any development must:

- 1. allow a vehicle, pedestrian, or bicycle to enter and exit the property to and from a street or an abutting site safely;***
- 2. limit vehicle access across a primary pedestrian, bicycle, or transit route wherever feasible;***
- 3. allow a vehicle to enter and exit any on-site parking area in a forward motion; and***
- 4. allow a vehicle to access any pad site from within the site.***

B. Land that is located in a Residential Detached zone must not be used for driveway or vehicular access to any land that is not in a Residential Detached zone, except:

- 1. in a Historic District; or***

- 2. where such access has been previously approved for a property with a legally existing nonresidential use.*

Section 6.1.4. Driveway Access

- A. Driveway dimensions must satisfy the following table:*

Zone	Width (min)	Width (max)	Radius (max)
R-30, R-20, R-10			
One-way	12'	16'	10'
Two-way	20'	24'	10'
CR, CRT, CRN, EOF, LSC, GR, NR			
One-way	12'	18'	10'
Two-way	20'	32'	15'
IL, IM, IH	30'	40'	30'

- B. The applicable deciding body may require a wider driveway if there is an unusual traffic, grade, or site condition.*
- C. If on-site parking is accessible from an improved alley with a right-of-way of at least 20 feet in width:*
- 1. access must be from the alley;*
 - 2. and new curb cuts along the public right-of-way must be limited, to the extent practicable.*
- D. A maximum of 2 driveways may be permitted for every 300 feet of site frontage along any street.*
- E. Unless the road is classified as a residential road, a vehicle must access a corner lot with only one driveway or a through lot from the street with the lower roadway classification.*

Conclusion: Under the criteria set in Section 59. 6.1.2., Site access standards do apply to this application since it is in a Commercial/Residential zone and requires a conditional use.

Technical Staff cataloged a number of problems with site access, on-site circulation and pedestrian facilities proposed for the use (Exhibit 59, pp. 9-11), and their concerns are quoted in Part II.C.2 of this Report and Decision. As stated above, the Applicant introduced a number of exhibits in response to Staff's concerns, including amended plans (Exhibits 100 and 101), which reduced the number of planned parking spaces and demonstrated potential site circulation. The Applicant's traffic engineer, Brian Biddle, testified that the amended plans, including the Truck Turn Plan (Exhibit 101(a)), would produce safe circulation for the proposed use. Tr. 8/20/19, 274 and Tr. 9/3/19, 194-196. The Applicant's engineer, Brad Fox, also testified that all the circulation

deficiencies that were noted by Technical Staff can be resolved without any major changes. Tr. 8/20/19, 92. He produced an email from an SHA Regional engineer, stating that the SHA engineer “would be okay with keeping the southernmost access point [on Connecticut Avenue] and closing the one closer to Plyers Mill.” Exhibit 89.

Conclusion: Based on this record, the Hearing Examiner finds that the evidence is sufficient at this stage to conclude that final access and circulation plans can be devised to safely handle access and site circulation. If that finding turns out to be incorrect, then this project will ultimately be rejected at the Preliminary Plan stage.

2. Parking Spaces Required and Parking Lot Screening

a. The Number of Required Parking Spaces:

The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance. Technical Staff indicates that, under Zoning Ordinance §59.1.4.2, a property in the CRT Zone is considered a Reduced Parking Area for the purposes of calculating required vehicle parking. Staff provided the following Table of required parking, and that which the Applicant will provide (Exhibit 59, p. 15):

Table 2: Vehicle Parking Requirements			
	Required		Proposed
	Min	Max	
Vehicle Parking Requirement (Section 59-6.2.4.B)			
• Self-storage (77,185 sf + 2 employees) @ 1(min)-3(max) spaces per 10,000 sf of GFA for storage units without driveway access + 1 space per employee	10	26	
• Artisan Manufacturing and Production (8,141 sf) @ 1(min)-3(max) per 1,000 sf	9	25	
• Restaurant (6,337 SF) @ 4 (min) – 12(max) spaces per 1,000 sf	26	76	
Total	45	127	56¹⁴

¹⁴ According to the testimony of the Applicant’s architect, Michelle Bach, the final plans call for a total of 56 parking spaces, including 51 standard spaces, 2 loading spaces and 3 handicapped accessible spaces. Tr. 9/3/19, 167. The

Conclusion: As is apparent from the Table, the Applicant's plans would provide for a number of parking spaces (56) within the range required by the Zoning Ordinance, and the Hearing Examiner so finds. Staff also noted the following (Exhibit 59, p. 15):

The Applicant proposes a cantilever over the surface parking requiring support columns. These are shown between the parking spaces to the rear of the property, which are dimensioned at the standard width of 8.5 feet. Staff is unable to assess whether the Applicant's parking proposal meets the zoning requirements of 59-6.2.4(E) because it is neither clear if the columns are scaled accurately on the plan nor clear if a vehicle's rear doors have adequate clearance to open. If the conditional use is approved, more detail is required to assess the proposal at the Preliminary Plan stage and the Applicant will need to provide wheel stops along the striped pedestrian corridor to protect pedestrians from vehicle movements.

Bicycle parking is not required for the Self-storage use, but if the Application moves forward, the Applicant will be required to locate the appropriate number of bicycle parking spaces on the Site Plan. The final number will be based on the Applicant's use mix, as specified in Section 59-6.2.4.

Loading

Section 59-6.2.8 requires two loading spaces for warehouse uses with 50,001-200,000 square feet of gross floor area (GFA). The proposed self-storage facility has 77,185 square feet of GFA, and the Applicant is proposing two loading spaces.

Conclusion: As indicated, the Applicant's plans call for the required number of loading spaces (2 of the 56 planned spaces), and the Hearing Examiner so finds. As stated by Technical Staff, "If the conditional use is approved, more detail is required to assess the proposal at the Preliminary Plan stage." The Hearing Examiner has not approved the conditional use, but if it were subsequently approved by higher authority, the Applicant would have to provide more details at Preliminary Plan review to confirm the functionality of the parking and loading plan.

Hearing Examiner has noted that correction to the Applicant's Second Revised Statement (Exhibit 99(e)) and has changed Technical Staff's chart, above, to reflect the correct number of planned parking spaces.

b. Parking Lot Landscaping:

As to required parking lot landscaping, Technical Staff states (Exhibit 59, p. 16):

Since more than 10 parking spaces are required for the Self-Storage facility, the Application must satisfy the parking lot landscaping standards under Section 59-6.2.9. The Landscape Plan appears to satisfy the perimeter parking requirements, but the parking lot does not contain the required landscape areas, nor does it show that the minimum required tree canopy will be provided.

The Applicant addressed these concerns at the OZAH hearing, providing an amended Conditional Use Site Plan (Exhibit 101(b)), an amended Materials Plan (Exhibit 101(c)), an amended Landscape Plan (Exhibit 101(d)) and a request for a waiver, pursuant to Section 59.6.2.10 of the Zoning Ordinance, to allow omission of some of the perimeter planting canopy trees that otherwise would be required along the eastern property line by Section 59.6.2.9.C.3.b.iii of the Zoning Ordinance. The Applicant's rationale for this waiver request is that the proximity of the proposed building face to the adjacent building makes the viability of canopy trees in this area questionable, and the proposed building overhang will achieve the shading otherwise envisioned by this section of the code. The Applicant's revised plans make the following changes:

- 1) four landscaped islands are added within the proposed surface parking areas (resulting in the loss of four parking spaces);
- 2) six canopy trees are added proximate to parking surfaces;
- 3) the plantings and proposed wall along the eastern property line are adjusted to ensure compliance with Section 59.2.9.C.3.b of the Zoning Ordinance; and
- 4) the length of the parking stalls along the eastern property line are reduced from 18 feet to 16 feet with a two foot overhang, as permitted by Section 59.6.2.5.E.2 of the Zoning Ordinance.

No other material changes have been made to the previously submitted plans.

Conclusion: The amended plans the Applicant filed on August 28, 2019, are reproduced in Parts II.C.2. and C.3. of this Report and Decision. They provide parking lot landscaping and a proposed tree canopy that gets closer to complying with applicable Zoning Ordinance provisions for parking lot screening and tree canopy.

It is noteworthy that, except for a recommendation for a tree panel buffering the proposed bicycle lanes, Technical Staff did not object to the revised Landscaping Plans, nor to the waiver request, in its comments on the amended plans. Exhibit 120. Based on the Applicant's rationale for the plan amendments and the waiver request, and Technical Staff's response thereto, the Hearing Examiner would approve the plan amendments and the waiver request if this conditional use were ultimately granted, subject to more detailed review at the Preliminary Plan stage.

3. Site Open Space, Landscaping and Lighting

a. Site Open Space:

Zoning Ordinance §59.4.5.4.B requires that 5% of this site be devoted to "Open Space." The amount of Open Space proposed in the final Conditional Use Site Plan (Exhibits 101(b), and 40(a)(i) and (ii)) is 22.1% of the site, which far exceeds the amount required. Section 59.6.3.6. of the Zoning Ordinance imposes a number additional requirements for the design of the Open Space. Technical Staff states the following regarding Open Space proposed for the site (Exhibit 59, p. 16):

This Project is required to provide 2,304 square feet (or 5% of the Property) as public open space. The proposed public open space exceeds the amount required and satisfies a majority of the requirements under Section 59-6.3.6. However, should this project move forward, an open space at this prominent corner should feature a signature artwork or a similar amenity that highlights Kensington's unique character.

The Applicant's landscape architect, Matt Clark, testified that the Applicant would provide public art and other amenities in Open Space on the site, and would meet the applicable requirements. Tr. 8/20/19, 152-156. There was no contrary evidence in the record.

Conclusion: Based on this record, the Hearing Examiner finds that the evidence is sufficient at this stage to conclude, if this conditional use were ultimately approved, that the Applicant would provide the required amount of Open Space and would design the Open Space in a manner

consistent with the requirements of Section 59.6.3.6. of the Zoning Ordinance. This finding is subject to review when details are provided at the Preliminary Plan stage.

b. Site Screening and Landscaping

Conclusion: The provisions of Division 6.5 of the Zoning Ordinance are very specific, but none apply to the use proposed in this case because it falls under the optional method of development. As stated in Zoning Ordinance §59. 6.5.2., “Division 6.5 only applies to standard method development.” Technical Staff also so concludes. Exhibit 59, p. 16. The Hearing Examiner therefore applies the general compatibility standards specified in Section 59.7.3.1.E.1.b.

That Section provides, in relevant part, that the application must meet applicable general requirements under Article 59-6, “to the extent the Hearing Examiner finds necessary to ensure compatibility.” In this case, there is conflicting evidence from the Applicant and the opposition.

Applicant’s architect, Michelle Bach, testified that in her opinion, the proposed building’s orientation, massing, pedestrian scale, the selected materials pallet of industrial windows, brick and stucco, the setbacks, signage, the landscaping and the feel of the building would comply with the Kensington Sector Plan and Design Guidelines and would be architecturally compatible with, and in harmony with, the character of the surrounding neighborhood. Tr. 8/20/19, 203-206. The Applicant’s landscape architect, Matt Clark, testified that, in his opinion, the proposed landscaping would be consistent both with the Kensington Sector Plan and the Kensington Design Guidelines, and would be compatible with the neighborhood. Tr. 8/20/19, 148-163.

In contrast, the witnesses for the Town of Kensington envision negative impacts on the surrounding neighborhood if this application were to be approved due to the deadening effect of a large building with only 10% non-storage use. *See* the summary of their testimony in Part II.E.2. of this Report and Decision.

Conclusion: The compatibility question addresses both present and future uses permitted in the neighborhood. As stated by the Maryland Court of Appeals in *Montgomery County v. Butler*, 417 Md. 271, 295, 9 A.3d 824, 838 (2010), “. . . each applicant must prove actually, to the satisfaction of the administrative decision-maker (subject to the narrow standards for judicial review and applicable constitutional principles), that his/her/its application will be compatible with the uses on (or future permitted use of) other properties in the neighborhood. [Emphasis added.]

Based on this record, the Hearing Examiner finds that the proposed building, with 90% of the use devoted to self-storage and all the floors above the second floor dark in the evening, would not be compatible with future development in the neighborhood, nor with the Kensington Sector Plan’s concept of future development in the Town Center.

b. Lighting

Conclusion: Newly proposed lighting from a conditional use abutting a lot with a detached house is regulated by Section 59.6.4.4. E. of the Zoning Ordinance; however, that is not the situation here. Instead, the lighting in this case is governed by Zoning Ordinance §59.6.4.4.D., which provides:

D. Excessive Illumination

Except where otherwise stated in this Chapter, on-site illumination must be 0.5 footcandles or less at the lot line, excluding street lights within the right-of-way.

Technical Staff indicated that the Applicant’s photometric plan did not show that lighting will be reduced to 0.5 footcandles or less along the lot lines. Exhibit 59, p. 16. Subsequent to that observation, the Applicant submitted a revised Photometric Plan entitled “Electrical Site Plan Lighting Calculations” (Exhibit 99(c)), to demonstrate that lighting at the property lines would not exceed 0.5 footcandles, per Zoning Ord. §59.6.4.4.D. See Part II.C.3. of this Report and Decision. Based on that evidence, the Hearing Examiner finds that the proposed lighting for the site would not exceed the applicable standards.

4. Signage

Conclusion: The use of signage is governed by Division 6.7 of the Zoning Ordinance. The Applicant did not produce a plan for signage until the August 20, 2019 OZAH hearing. The planned sign locations are shown in the Signage Plan (Exhibit 87(a)), and that plan, as well as samples of the proposed signs, are reproduced in Part II.C.3. of this Report and Decision. Given the delayed filing of the signage plans, if this application were ultimately approved, a further hearing on the compatibility of the signage would have to be held. In addition, the signage proposed by the Applicant would have to be approved, for consistency with Zoning Ordinance Division 59-6.7, by the Department of Permitting Services (DPS), and/or its Sign Review Board.

IV. CONCLUSION AND DECISION

As set forth above, the application meets some, but not all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Arguments have been made on both sides of this case, which may account for the 3 to 2 split on the Planning Board (Exhibit 64(a)). On the one hand, Technical Staff, the Planning Board majority, the Town of Kensington and those members of the community who are opposed to the development have fairly interpreted the 2012 Kensington Sector Plan as seeking a different type of development to enliven the central part of Kensington, rather than still another self-storage facility in the neighborhood. The record establishes that only 10 percent of the proposed building would be devoted to uses other than self-storage.

On the other hand, the Applicant's witnesses and the members of the community who support this project argue that the removal of the existing gas station on the site and the addition of the proposed restaurant and artists' studios may improve the attraction of people into the area and thereby enliven central Kensington. Some also suggested that the proposed development may be

the best use that is likely to occupy this site. *See* description of arguments supporting the proposal in the Planning Board letter to the Hearing Examiner (Exhibit 64(a)). Tr. 8/20/19, 289-294.

The Hearing Examiner did not, and will not, consider alternative uses for the site since his responsibility is to determine whether the use proposed by the Applicant, as described in the plans of record, meet the standards set forth in the Zoning Ordinance for this type of conditional use. Whether there are potentially better uses for the site, as suggested by the opposition, or the proposed use is the only one for which this property is suited, as suggested by the supporters, is not a question for the Hearing Examiner to resolve, and both sides agreed with the Hearing Examiner's position in this regard. Tr. 8/20/19, 290-291. That is not to say that the Hearing Examiner cannot consider whether the proposed use fulfills the Sector Plan's goals and recommendations, for that question is posed directly to the Hearing Examiner by Zoning Ordinance §§59.7.3.1.E.1.c. and d. It is to say that it is not up to the Hearing Examiner to make policy decisions on what type of development is best for the community on any given site, but rather his job is to attempt to discern the intent of the policy makers¹⁵ in fashioning the development policy for this area. That development policy in this case is the 2012 Kensington Sector Plan.

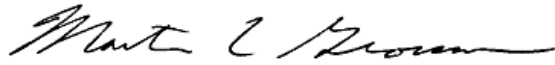
The Applicant's final plans may describe the best practical design for a self-storage facility, containing about 10% restaurant space and artists' studios, that could be planned for this site. Nevertheless, that does not mean that the proposal satisfies what those who approved and adopted the 2012 Kensington Sector Plan intended for this site or envisioned for this neighborhood. Thus, we have concluded, based on the extensive evidence in this case, that the proposed use on this site would not be sufficiently consistent with the goals of Kensington Sector Plan and would result in

¹⁵ The policy makers in this case are the Town of Kensington (given its special statutory role in land planning matters), the Planning Department, the Planning Board and the County Council, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland.

undue, non-inherent adverse effects on the community. *See* Discussion in Part II.E. of this Report and Decision. Given that conclusion, the Hearing Examiner must deny the conditional use application, and he hereby does so.

Based on the foregoing findings and conclusions and a thorough review of the entire record, **the application of 1784 Capital Holdings, LLC, for a conditional use** under Section 59.3.6.8.D.2.b. of the Zoning Ordinance, to operate a self-storage facility at 10619 Connecticut Avenue, in Kensington, Maryland, **is hereby DENIED.**

Issued this 8th day of October, 2019,



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The U.S. Postal mailing address, telephone number and email address of the Board of Appeals are:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board's physical location has been temporarily moved to Room 1 at the Broome School, 751 Twinbrook Parkway, Rockville, Maryland 20851, while renovations of the Council Office Building are proceeding. The Board's telephone number, U.S. Postal address and email address will remain unchanged.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

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Robert Kelly McKone, Applicant's Executive Vice President, Real Estate
Mountain View Burleson, LLC, Property Owner
Tracey Furman, Mayor, Town of Kensington
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